



The Regulation of Lead-Based Paint in Air Force Housing  
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## I. INTRODUCTION

Childhood lead poisoning has been referred to as the "silent epidemic"<sup>1</sup> and characterized as "the most common environmental disease of young children ... eclipsing all other environmental health hazards found in the residential environment."<sup>2</sup> Approximately 8.9 percent of all children in America under the age of six have blood lead levels in excess of toxic levels (10 µg/dL).<sup>3</sup> Lead in the bloodstream at low levels has been associated with decreased intelligence, impaired neurobehavioral development, decreased growth, decreased hearing acuity, and reduced weight at birth.<sup>4</sup> Part II of this paper discusses lead poisoning in more depth. The most common cause of elevated blood lead levels in children is lead-based paint.<sup>5</sup> As with many other environmental hazards, lead-based paint falls within the regulatory scope of a number of environmental statutes, including, the Lead-Based Paint Poisoning Prevention Act,<sup>6</sup> the Residential Lead-Based Paint Hazard Reduction Act of

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<sup>1</sup> Mahoney, *Four Million Children at Risk: Lead Paint Poisoning Victims and the Law*, 9 STAN. ENVTL. L.J., 46, 46 (1990)

<sup>2</sup> 61 Fed. Reg. 29170, 29170 (1996) (citing Centers for Disease Control, *Strategic Plan for the Elimination of Lead Poisoning* (1991) and Agency for Toxic Substances and Disease Registry, *The Nature and Extent of Lead Poisoning in Children in the United States: A Report to Congress* (1988))

<sup>3</sup> U.S. Department of Housing and Urban Development, *Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing*, xx (1995) (hereinafter HUD Guidelines)

<sup>4</sup> H. Needleman, *Low Level Lead Exposure: A Continuing Problem*, 19:3 PEDIATRIC ANNUALS 208, 209-10 (March 1990) (hereinafter Low Level Exposure)

<sup>5</sup> Centers for Disease Control, *Preventing Lead Poisoning in Young Children, A Statement by the Centers for Disease Control*, 18 (1991) (hereinafter Preventing Lead Poisoning)

<sup>6</sup> 42 U.S.C. §§4821-46 (1994)

1992,<sup>7</sup> the Resource Conservation and Recovery Act (RCRA),<sup>8</sup> the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),<sup>9</sup> and state environmental statutes. This paper analyzes the regulation of lead-based paint in Air Force housing.

The current Air Force lead-based paint program<sup>10</sup> was initiated in 1993 and requires installations to identify, evaluate, control and eliminate lead-based paint hazards. These requirements exceed all federal statutory and regulatory requirements. Part III of this paper identifies federal lead-based paint requirements which are applicable to Air Force housing. In addition, Part III recommends that the implementation of the current Air Force lead-based paint program be modified in the forthcoming Air Force Instruction and Air Force Manual. In essence, the Air Force Instruction and Air Force Manual should clearly distinguish between lead-based paint requirements (imposed by federal law or Air Force policy) and information which is merely provided for guidance. After clarifying the distinction between requirements and guidance, the Instruction and Manual should allow each installation the discretion to determine how to best identify, evaluate, control and eliminate lead-based paint hazards in Air Force housing. Part IV looks at the relationship between lead-based paint activities and RCRA. Part V discusses the applicability of CERCLA to residential lead-

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<sup>7</sup> Pub. L. No. 102-550, §§1001-1061, 106 Stat. 3672, 3897-3927 (1992)

<sup>8</sup> 42 U.S.C. §§6901-6992k (1994)

<sup>9</sup> 42 U.S.C. §§9601-9675 (1994)

<sup>10</sup> Letter from Air Force Chief of Staff, *Air Force Policy and Guidance on Lead-Based Paint in Facilities* (May 24, 1993) (hereinafter AF Lead Paint Policy)

based paint hazards and concludes that CERCLA is broad enough to encompass such hazards. However, EPA's failure to apply CERCLA to private residential lead-based paint hazards precludes the statute's application to federal lead-based paint hazards. Part VI examines the lead-based paint waiver of sovereign immunity, the tort implications of the waiver, as well as the lead-based paint programs of Massachusetts, Illinois and California.

## II. LEAD POISONING

### A. PHYSIOLOGICAL EFFECT

"Lead is a poison that affects virtually every system in the body."<sup>11</sup> Lead primarily affects the body by binding to numerous enzymes and preventing them from functioning properly.<sup>12</sup> Lead also affects the translation of DNA codes in certain protein structures.<sup>13</sup> Symptoms of lead poisoning in adults may include lethargy, nausea and vomiting, abdominal colic, and peripheral neuropathy.<sup>14</sup> While lead poisoning may affect all ages, young and unborn children are the most susceptible portion of the population because lead has a particularly harmful effect on a child's developing brain and nervous system.<sup>15</sup> In children, high blood lead levels (greater than 80 µg/dL) may cause convulsions, comas, or

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<sup>11</sup> Preventing Lead Poisoning, *supra* note 5, at 7

<sup>12</sup> Low Level Exposure, *supra* note 4, at 209-10

<sup>13</sup> *Id.* at 210

<sup>14</sup> Minocha, *NUTRITION: Lowering the Risks of Lead Toxicity*, 3 FOR KIDS' SAKE 2, 2 (Summer 1985)

<sup>15</sup> Preventing Lead Poisoning, *supra* note 5, at 7

even death.<sup>16</sup> At levels as low as 10 µg/dL, lead poisoning has been associated with decreased intelligence, impaired neurobehavioral development, decreased growth, decreased hearing acuity, and reduced weight at birth.<sup>17</sup> Although blood lead levels may be reduced through treatment, the neurological damage is permanent.<sup>18</sup>

Lead plays no normal physiological role in the human body.<sup>19</sup> Therefore, the optimum blood lead level is zero.<sup>20</sup> However, in an industrial society, exposure to lead is inevitable. Faced with this reality, the medical profession has continually tried to determine an acceptable blood lead level. "Until 1943, it was widely believed that if a child did not die of lead toxicity, there were no lasting sequelae."<sup>21</sup> However, in 1943, a study established that children who had recovered from lead poisoning had a higher incidence of learning disorders and behavior problems.<sup>22</sup> The study demonstrated that non-fatal blood lead levels may result in permanent adverse health effects. By the mid-1960s, physicians recognized a blood lead level of 60 µg/dL as sufficiently hazardous to require treatment.<sup>23</sup> In 1975, the Centers for Disease Control (CDC) recommended 30 µg/dL as the threshold for

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<sup>16</sup> *Id.* at 9

<sup>17</sup> Low Level Exposure, *supra* note 4, at 210

<sup>18</sup> Garrettson, *SILENT MENACE: Lead as a Cause of Retardation and Learning Disabilities*, 3 FOR KIDS' SAKE 1, 1 (Summer 1985)

<sup>19</sup> H. NEEDLEMAN, HUMAN LEAD EXPOSURE 36 (1992) (hereinafter Human Lead Exposure)

<sup>20</sup> *Statement on Childhood Lead Poisoning*, 79 PEDIATRICS 457, 457 (1987)

<sup>21</sup> Low Level Lead Exposure, *supra* note 4, at 208

<sup>22</sup> *Id.*

intervention.<sup>24</sup> The CDC subsequently reduced the intervention threshold level to 25 µg/dL in 1985 and then to 10 µg/dL in 1991.<sup>25</sup> Although no safe level of blood lead has been identified, harmful effects below 10 µg/dL have not been definitively established.<sup>26</sup>

## **B. LEAD POISONING AND LEAD-BASED PAINT**

The toxic effects of lead have been known for centuries. "A report by Hippocrates in approximately 600 B.C. is believed to be the first clinical description of lead toxicity. The Romans were also aware of the toxic effects of lead on the human system. Pliny, Paulus Aegineta and Vitruvius all comment on the clinical syndrome of lead poisoning."<sup>27</sup> Even Benjamin Franklin described the pernicious effects of lead in tinkers, typesetters and painters.<sup>28</sup> However, it was not until the turn of the century that childhood lead poisoning was first described and linked to lead-based paint.<sup>29</sup> In 1908, A.J. Turner, a pioneer in lead poisoning research, wrote that millions of houses are still "poison traps for children's fingers, and every year furnished its quota of ill-health and suffering, crippling and hopelessness."<sup>30</sup>

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<sup>23</sup> Preventing Lead Poisoning, *supra* note 5, at 7

<sup>24</sup> *Id.* at 8

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 2

<sup>27</sup> Galazka, *Lead Poisoning in Children: A Multidimensional Hazard*, 36 PEDIATRIC BASICS (March 1984)

<sup>28</sup> Low Level Lead Exposure, *supra* note 4, at 208

<sup>29</sup> *Id.* (In Australia, A.J. Turner and J.L. Gibson established that the cause of lead poisoning in children was white lead-based paint on the porches and railings of the children's homes.)

Even though the risks associated with lead-based paint were well documented early in the century, lead-based paint still remains the major source of lead poisoning in the United States.<sup>31</sup> In the United States, it is estimated that 3.8 million homes occupied by young children contain lead-based paint in poor or deteriorated condition.<sup>32</sup> Young children ingest lead-based paint primarily through normal hand-to-mouth activity.<sup>33</sup> Children may either ingest the lead-based paint chips directly or ingest dust or soil that has been contaminated by lead-based paint.<sup>34</sup> As such, the dangers associated with lead-based paint are not limited to the paint itself. Instead, lead-based paint hazards also include lead-contaminated dust and lead-contaminated soil.

### **C. LEAD POISONING IN AIR FORCE HOUSING**

While, as noted earlier, it is estimated that 8.9 percent of American children under the age of 6 have blood lead levels greater than 10 µg/dL, the incidence of elevated blood lead levels for children residing in Air Force housing is drastically less. In fiscal years 93-95, the Air Force tested 30,560 children who lived on Air Force installations for elevated blood lead levels.<sup>35</sup> Of the children tested, 219 (or, 0.7 percent) had elevated blood lead levels

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<sup>30</sup> HUMAN LEAD EXPOSURE, *supra* note 19, at 39

<sup>31</sup> Preventing Lead Poisoning, *supra* note 5, at 17

<sup>32</sup> Preventing Lead Poisoning, *supra* note 5, at 18

<sup>33</sup> *Statement on Childhood Lead Poisoning*, 79 PEDIATRICS 457, 460 (1987)

<sup>34</sup> Preventing Lead Poisoning, *supra* note 5, at 18 (Soil and dust may also be contaminated by leaded gas emissions or industrial sources (*e.g.*, smelters).)

<sup>35</sup> All Air Force statistics cited in this section were provided by HQ AFCESA/CESE, 139 Barnes Drive, Suite 1, Tyndall Air Force Base, Florida, 32403-5319

traceable to lead-based paint in housing. Of the 219 children with elevated blood lead levels, 197 children had blood lead level from 10-19 µg/dL. Twenty-two children had blood lead levels from 20-44 µg/dL. No child had a blood lead level higher than 45 µg/dL. While lead-based paint is a significant hazard nationwide, this does not seem to be the case for the Air Force .

### III. LEAD-BASED PAINT LEGISLATION

In 1992, Congress passed the Residential Lead-Based Paint Hazard Reduction Act to overhaul and “expand significantly the commitment of the federal government to reduce and eliminate lead-based paint hazards in older housing.”<sup>36</sup> In response to the new statute, the Air Force developed an extensive, lead-based paint program to protect residents of Air Force installations from lead-based paint hazards.<sup>37</sup> The Air Force program has been remarkably successful, as noted earlier, with a 0.7 percent incidence rate in children as compared to the national average of 8.9 percent. The purpose of this section is to identify the legal requirements related to lead-based paint in military housing so that the Air Force can take advantage of the flexibility it has been afforded and make informed decisions about how to best manage its residential lead-based paint.<sup>38</sup>

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<sup>36</sup> S. REP. NO. 332, 102d Cong., 2d Sess. 107 (1992)

<sup>37</sup> AF Lead Paint Policy, *supra* note 10

<sup>38</sup> This is important as the Air Force is currently developing an Air Force Instruction and an Air Force Manual to clarify its lead-based paint policy. Letter from the Office of The Civil Engineer, Director of Environment, *Policy and Guidance on Lead-Based Paint (LBP) Final Disclosure Rule* (Aug. 19, 1996)

The Residential Lead-Based Paint Hazard Reduction Act made a number of sweeping changes to the nation's lead-based paint laws. However, the statute added only two new requirements applicable to Air Force housing: the disclosure rule<sup>39</sup> and the requirement to use certified personnel for lead-based paint activities.<sup>40</sup> The requirements concerning the sale of federally owned housing<sup>41</sup> are not new as the 1973 amendments to the Lead-Based Paint Poisoning Prevention Act required "procedures to eliminate the hazards of lead based paint poisoning in all federally owed properties prior to the sale of such properties".<sup>42</sup>

#### **A. STATUTORY REVIEW**

The first federal statute to address residential lead-based paint was the Lead-Based Paint Poisoning Prevention Act of 1971.<sup>43</sup> The Act has been amended numerous times. The most recent amendments were included in the Residential Lead-Based Paint Hazard Reduction Act of 1992. The Residential Lead-Based Paint Hazard Reduction Act of 1992 is

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<sup>39</sup> 42 U.S.C. §4852d (1994)

<sup>40</sup> 15 U.S.C. §2682 (1994)

<sup>41</sup> 42 U.S.C. §4822(a)(3) (1994)

<sup>42</sup> Pub. L. No. 93-151, 87 Stat. 566 (1973). Also, I do not consider the lead-based paint waiver of sovereign immunity a new requirement. Although the waiver of sovereign immunity, 15 U.S.C. §2688 (1996), is a significant new provision in the statute and is discussed in Part VI, it does not add any new requirements because it merely subjects the Air Force to sanctions for failing to abide by applicable federal, state and local laws.

<sup>43</sup> Pub. L. No. 91-695, 84 Stat. 2078 (1971)



commonly referred to as "Title X" because it is Title X of the Housing and Community Development Act of 1992.<sup>44</sup> Title X consists of five subtitles:

Subtitle A: The primary purpose of Subtitle A (§1011 to §1018) is the reduction of residential lead-based paint hazards by establishing a grant program for state and local governments, by mandating various new lead-based paint requirements, and by creating a lead-based paint task force. Only §1012, *Evaluation and Reduction of Lead-Based Paint Hazards in Federally Assisted Housing*, and §1013, *Disposition of Federally Owned Housing*, amend the Lead-Based Paint Poisoning Prevention Act of 1971. The other sections of Subtitle A add or amend other portions of the United States Code.

Subtitle B: Subtitle B consists of one section (§1021) and amends the Toxic Substances Control Act (TSCA). Section 1021 primarily adds twelve sections to TSCA (§401 through §412).<sup>45</sup> These sections are known as TSCA, subchapter IV, or as the Lead-Based Paint Exposure Reduction Act.<sup>46</sup>

Subtitle C: Subtitle C (§1031 to §1033) addresses worker safety and primarily amends the Occupational Safety and Health Act of 1971. The requirements of Subtitle C are beyond the intended scope of this paper.

Subtitle D: Subtitle D (§1051 to §1053, §1056) requires continuing HUD research on lead-based paint hazards and also requires two reports from the General Accounting Office.

Subtitle E: Subtitle E (§1061) requires HUD to submit an annual report to Congress concerning its lead-based paint program.

For the purposes of this paper, the Lead-Based Paint Hazard Reduction Act of 1992 will be referred to as "Title X".

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<sup>44</sup> Pub. L. No. 102-550, 106 Stat. 3672 (1992)

<sup>45</sup> 15 U.S.C. §§2681-92 (1994)

<sup>46</sup> Pub. L. No. 102-550, §1021(c), 106 Stat. 3672, 3924 (1992)

## B. HISTORY OF LEAD-BASED PAINT LEGISLATION

### (1) LEAD-BASED PAINT POISONING PREVENTION ACT OF 1971

Even though the scientific community was aware of the hazards of residential lead-based paint since the turn of the century, and Australia had passed a law in the 1920s which restricted the use of lead-based paint in dwellings,<sup>47</sup> Congress did not address the nation's residential lead-based paint problem until 1971. The Lead-Based Paint Poisoning Prevention Act was a very modest first step toward reducing the hazards posed by residential lead-based paint. The most noteworthy portion of the statute prohibited the use of lead-based paint in residential structures constructed or rehabilitated by the federal government.<sup>48</sup> The Consumer Product Safety Commission's ban on the manufacture of lead-based paint for residential use did not take effect until February 27, 1978.<sup>49</sup> The Lead-Based Paint Poisoning Prevention Act also contained grant provisions for states to "detect and treat incidents of lead-based paint poisoning"<sup>50</sup> and "to develop and carry out programs to

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<sup>47</sup> Low Level Exposure, *supra* note 4, at 208

<sup>48</sup> Pub. L. No. 91-695, §401, 84 Stat. 2078, 2079 (1971) (Lead-based paint was defined as paint containing 1 percent lead by weight in the non-volatile content of the paint or in the dried film of the paint. Pub. L. No. 91-695, §501(3), 84 Stat. 2078, 2080 (1971). The definition of lead-based paint is currently 0.5 percent lead by weight. 42 U.S.C. §4851b(14) (1994); 15 U.S.C. §2681(9) (1994))

<sup>49</sup> 16 C.F.R. §1303.4 (1996) (For the purpose of the ban on the manufacture of lead-based paint, CPSC defines lead-based paint as paint containing lead or lead compounds in excess of .06 percent of the total non-volatile content of the paint or the weight of the dry paint film. Thus, Title X's definition and CPSC's definition of lead-based paint are significantly different.)

<sup>50</sup> Pub. L. No. 91-695, §101, 84 Stat. 2078, 2078 (1971)

eliminate the hazards of lead-based paint poisoning.”<sup>51</sup> In addition, the Secretary of Housing and Urban Development was required to investigate the “nature and extent of the problem of lead-based paint in the United States”.<sup>52</sup>

## **(2) AMENDMENTS OF 1973, 1976 AND 1978**

The 1973 Amendments<sup>53</sup> to the Lead-Based Paint Poisoning Prevention Act required, *inter alia*, the Secretary of Housing and Urban Development to “implement procedures to eliminate the hazards of lead-based paint poisoning in all federally owned properties prior to the sale of such properties when their use is intended for residential habitation.”<sup>54</sup> In addition, the 1973 Amendments required the Secretary of Housing and Urban Development “to eliminate as far as practicable the hazards of lead based paint poisoning with respect to any existing housing which may present such hazards and which is covered by an application for mortgage insurance or housing assistance payments under a program administered by the Secretary.”<sup>55</sup> As such, Congress intended to eliminate (as far as practicable) lead-based paint hazards in housing covered by mortgage insurance and in housing receiving assistance payments, but did not intend to eliminate lead-based paint hazards in housing owned by federal agencies (unless it was to be sold). Congress’ practice

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<sup>51</sup> Pub. L. No. 91-695, §201, 84 Stat. 2078, 2078-9 (1971)

<sup>52</sup> Pub. L. No. 91-695, §301, 84 Stat. 2078, 2079 (1971)

<sup>53</sup> Pub. L. No. 93-151, 87 Stat. 565 (1973)

<sup>54</sup> *Id.* at 566

<sup>55</sup> *Id.*

of imposing different lead-based paint requirements on federally owned housing and on federally assisted housing began in 1973 and continues to the present.<sup>56</sup>

The 1976<sup>57</sup> and 1978<sup>58</sup> Amendments to the Lead-Based Paint Poisoning Prevention Act mainly concerned grant programs and did not impact federally owned housing.

### **(3) THE AMENDMENTS OF 1988**

The Lead-Based Paint Poisoning Prevention Act was amended twice in 1988. The first amendment<sup>59</sup> is significant because it is a source of possible confusion regarding the requirements applicable to federally owned property. That amendment adds a new subsection (c) to 42 U.S.C. §4822 entitled "Inspection Requirements" which states "[t]he Secretary shall require the inspection of all intact and nonintact interior and exterior painted surfaces of *housing subject to this section* for lead-based paint using an approved x-ray fluorescence analyzer or comparable approved sampling or testing technique".<sup>60</sup> The

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<sup>56</sup> In 1988, Congress directed HUD to provide tenants and purchasers of federally assisted housing with a brochure describing the hazards associated with lead-based paint. Tenants of federally owned housing were not required to receive the same brochure. Housing and Community Development Act of 1987, Pub. L. No. 100-242, §566, 101 Stat. 1815, 1945 (1988). In 1992 under Title X, Congress required that lead-based paint risk assessments be performed on federally assisted housing. 42 U.S.C. §4822(a) (1996). In addition, Congress required interim lead-based paint controls be implemented at federally assisted housing. *Id.* Interim controls are "a set of measures designed to reduce temporarily human exposure or likely exposure to lead-based paint hazards". 42 U.S.C. §4851b(13) (1996). Congress has not required risk assessments or interim controls for all federally owned housing.

<sup>57</sup> National Consumer Health Information and Health Promotion Act of 1976, Pub. L. No. 94-317, §204, 90 Stat. 695, 705 (1976)

<sup>58</sup> Health Services and Centers Amendments of 1978, Pub. L. No. 95-626, §316(b), 92 Stat. 3551, 3588 (1978)

<sup>59</sup> Housing and Community Development Act of 1987, Pub. L. No. 100-242, §566, 101 Stat. 1815, 1945 (1988)

amendment also required the results of the inspection be “provided to any potential purchaser or tenant of the housing.”<sup>61</sup> The possible confusion arises because §4822(c) applies to “housing subject to this section” and §4822 establishes requirements for both federally assisted housing (*e.g.*, eliminate as far as practicable lead based paint hazards in federally assisted housing) and federally owned housing (*i.e.*, abate lead-based paint hazards in federally owned housing prior to sale).<sup>62</sup> Arguably, since both federally assisted and federally owned housing are subject to §4822 requirements, both types of housing are subject to the inspection and disclosure requirements of §4822(c). The House of Representatives Report<sup>63</sup> and the Conference Report<sup>64</sup> on the amendment do not clarify the “subject to this section” portion of the statute. However, the implementing regulation interprets §4822(c) as only referring to HUD associated housing.<sup>65</sup> As a result, housing owned by other federal agencies is not affected by §4822(c)’s inspection and reporting requirements.

Title X did not appreciably change §4822(c). The only changes that were made were substituting the word “certified” for “qualified” and inserting the phrase “or 0.5 percent by

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<sup>60</sup> *Id.* at 1946 (*italics added for emphasis*)

<sup>61</sup> *Id.*

<sup>62</sup> 42 U.S.C. §4822(a) (1994)

<sup>63</sup> H.R. REP. NO. 122, 100th Cong., 1st Sess. 92-3 (1987)

<sup>64</sup> H.R. CONF. REP. NO. 426, 100th Cong., 1st Sess. 243-4 (1987)

<sup>65</sup> 53 Fed. Reg. 20790, 20798 (1988)

weight”.<sup>66</sup> As a result, the inspection and reporting requirements of 42 U.S.C. §4822(c) are essentially unchanged since 1988 and not applicable to Air Force owned housing.

The second 1988 amendment<sup>67</sup> to the Lead-Based Paint Poisoning Prevention Act mainly clarifies the first 1988 amendment.<sup>68</sup> However, the clarifications concern a provision which explicitly refers only to public housing and does not affect Air Force owned housing. However, the second amendment also adds subsection (g) to 42 U.S.C. §4822 which states that “[t]his section may not be construed to affect the responsibilities of the Environmental Protection Agency with respect to the protection of the public health from hazards posed by lead-based paint.”<sup>69</sup> The purpose of the provision was to clarify that “[s]ection 302 of the Lead-Based Paint Poisoning Prevention Act may not be construed to affect the responsibilities of the Environmental Protection Agency with respect to [lead-based paint hazards].”<sup>70</sup> 42 U.S.C. §4822(g) is an important provision relating to the issue of whether the EPA can regulate residential lead-based paint under CERCLA. This issue is discussed in Part V of this paper.

### **C. APPLICABLE REQUIREMENTS OF TITLE X**

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<sup>66</sup> The two changes to 42 U.S.C. §4822(c) made by Title X are found in Pub. L. No. 102-550, §1012, 106 Stat. 3672, 3905 (1992)

<sup>67</sup> Stewart B. McKinney Homeless Assistance Amendments Act of 1988, Pub. L. No. 100-628, §1088, 102 Stat. 3224, 3280 (1988)

<sup>68</sup> H.R. CONF. REP. NO. 1089, 100th Cong., 2d Sess. 108 (1988)

<sup>69</sup> Stewart B. McKinney Homeless Assistance Amendments Act of 1988, Pub. L. No. 100-628, §1088(h), 102 Stat. 3224, 3283 (1988)

<sup>70</sup> H.R. CONF. REP. NO. 1089, 100th Cong., 2d Sess. 110 (1988)

## **(1) DISCLOSURE RULE**

Section 1018 of Title X requires HUD and EPA to jointly “promulgate regulations under this section for the disclosure of lead-based paint hazards in target housing which is offered for sale or lease.”<sup>71</sup> The final regulations were promulgated on March 6, 1996,<sup>72</sup> and require sellers and lessors to:

- (a) Provide purchasers and lessees with an EPA-approved lead hazard information pamphlet;
- (b) Disclose to purchasers and lessees (and their agents) known lead-based paint and lead-based paint hazards. In addition, any available information concerning known lead-based paint or lead-based paint hazards (*e.g.*, basis for determinations, location of lead-based paint, the condition of the painted surface) must be disclosed;
- (c) Provide purchasers and lessees all available records or reports pertaining to lead-based paint or lead-based paint hazards;
- (d) Provide purchasers with an opportunity to conduct a risk assessment or an inspection for the presence of lead-based paint; and,
- (e) Provide purchasers and lessees with a lead warning statement.<sup>73</sup>

The disclosure rule applies anytime the Air Force sells or leases target housing.<sup>74</sup> A seller is defined as any entity, including government agencies, that transfers legal title to

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<sup>71</sup> 42 U.S.C. §4851d (1994). Target housing means “any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is less than 6 years of age resides or is expected to reside in such housing for the elderly or persons with disabilities) or any 0-bedroom dwelling.” 42 U.S.C. §4851b (27) (1994)

<sup>72</sup> 61 Fed. Reg. 9064 (1996)

<sup>73</sup> 24 C.F.R. §§35.88, 35.90, 35.92 (1996); 40 C.F.R. §§745.107, 745.110, 745.113 (1996)

<sup>74</sup> 42 U.S.C. §4851d (1994)

target housing.<sup>75</sup> The Air Force is most likely to sell housing in the context of base realignment and closure. A lessor is defined as any entity, including government agencies, which leases, rents or subleases target housing.<sup>76</sup>

Although assigning military family housing to an Air Force member is not commonly thought of as a "lease", it has all the trappings of a lease. When an Air Force member accepts housing, he or she is entering into a binding agreement with the Air Force which is governed by an established set of terms, including the forfeiture of the member's housing allowance. The agreement to provide military family housing looks, sounds and smells like a lease, and is currently treated by the Air Force as a lease for the purposes of Title X.<sup>77</sup>

One significant aspect of the disclosure rule is that it does not require the evaluation, inspection, or abatement of lead-based paint.<sup>78</sup> The Air Force is only required to provide known information concerning lead-based paint and lead-based paint hazards. Although this may be a daunting and onerous task for large housing areas, it is purely an administrative task and does not require any on-site investigation.

Another aspect of the disclosure rule is that it requires disclosure of both lead-based paint and lead-based paint hazards. In other words, if the Air Force were to abate by

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<sup>75</sup> 24 C.F.R. §35.86 (1996); 40 C.F.R. §745.103 (1996)

<sup>76</sup> 24 C.F.R. §35.86 (1996); 40 C.F.R. §745.103 (1996)

<sup>77</sup> Letter from the Office of The Civil Engineer, Director of Environment, *Policy and Guidance on Lead-Based Paint (LBP) Final Disclosure Rule* (Aug. 19, 1996)



permanent containment or encapsulation every lead-based paint hazard in Air Force housing, the housing would still be subject to the disclosure rule because lead-based paint is still present in the home. The only way to avoid the disclosure rule when leasing target housing is to have the property declared lead-free by a certified inspector.<sup>79</sup> This exemption makes sense because lead-based paint, even if not a current hazard, could become a hazard through deterioration or through renovation activities and, therefore, it would be prudent to warn tenants. However, the rationale offered by HUD and EPA is inadequate. HUD and EPA "believe that the exemption will provide a valuable incentive to building owners to conduct inspections and remove lead-based paint where present."<sup>80</sup> In essence, HUD and EPA are hoping that the disclosure rule is so burdensome that it will force lessors to remove lead-based paint regardless of whether it presents a health hazard.<sup>81</sup>

Unlike lessors, sellers may not escape the disclosure rule by being declared lead-free by a certified inspector.<sup>82</sup>

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<sup>78</sup> 24 C.F.R. §35.88(a) (1996); 40 C.F.R. §745.107(a) (1996) (Both sections state: "[n]othing in this section implies a positive obligation on the seller or lessor to conduct any evaluation or reduction activities.")

<sup>79</sup> 24 C.F.R. §35.82(b) (1996); 40 C.F.R. §745.101(b) (1996)

<sup>80</sup> 61 Fed. Reg. 9064, 9067 (1996)

<sup>81</sup> This rationale is contrary to the focus of Title X which emphasizes efficiency and cost-effectiveness when reducing the hazards associated with lead-based paint. S. REP. NO. 332, 102d Cong., 2d Sess. 111 (1992). Coercing owners with burdensome regulations so that they abate lead-based paint which does not pose a health hazard is a waste of money because owners are being forced to eliminate a non-existent health risk.

<sup>82</sup> 61 Fed. Reg. 9064, 9067 (1996) (This restriction makes little sense. The rationale offered by HUD and EPA for not allowing sellers the opportunity to avoid the disclosure rule is that a purchaser might be denied the opportunity to conduct a lead-based paint risk assessment or inspection, a statutory right established by Title X. This rationale is weak at best. A better

## (2) LEAD-BASED PAINT ACTIVITIES - TRAINING AND CERTIFICATION

TSCA §402, added by §1021 of Title X, requires EPA to “promulgate regulations governing lead-based paint activities to ensure that individuals engaged in such activities are properly trained; that training programs are accredited; and that contractors engaged in such activities are certified.”<sup>83</sup> The regulations implementing TSCA §402 will be codified at 40 C.F.R. Subpart L<sup>84</sup> and require, *inter alia*, all lead-based paint activities (*i.e.*, inspection, risk assessment and abatement) in target housing and child-occupied facilities be conducted by certified individuals or firms (there is a limited exception for individuals performing work on their own dwellings).<sup>85</sup>

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approach would be to only require the seller to allow purchasers the opportunity to conduct a risk assessment or inspection if the housing is declared lead-free by a certified inspector. It is senseless to impose a laundry list of requirements to protect one statutory inspection right. This is especially true if the laundry list of requirements being imposed pertains to lead-based paint and the house has been declared lead-free.)

<sup>83</sup> 15 U.S.C. §2682(a) (1994). To become a certified lead-based paint abatement worker, a person must complete an accredited training program. 61 Fed. Reg. 45778, 45820 (1996) (to be codified at 40 C.F.R. §745.226(c)). An accredited training program for abatement workers “shall last a minimum of 16 training hours, with a minimum of 8 hours devoted to hands-on training activities.” *Id.* at 45816 (to be codified at 40 C.F.R. §745.225(c)(6)(v)). The curriculum for the training program shall include information regarding: the role and responsibilities of the abatement worker; the adverse health affects of lead; federal, state and local lead-based paint regulations; lead-based paint recognition and control; and, methods to abate and reduce lead-based paint hazards. *Id.* at 45817 (to be codified at 40 C.F.R. §745.225(d)(5)).

<sup>84</sup> 61 Fed. Reg. 45778, 45813-45825 (1996) (to be codified at 40 C.F.R. §§745.220-745.239)

<sup>85</sup> 61 Fed. Reg. 45778, 45813-5 (1996) (to be codified at 40 C.F.R. §745.220 & §745.223) (Persons performing lead-based paint activities in their own home need not be trained or certified. Also, individuals performing lead-based paint activities in a home where a child has been identified with elevated blood lead levels need not be trained or certified.)

The lead-based paint waiver of sovereign immunity codified in TSCA §408<sup>86</sup> and discussed in Part V, subjects federal agencies to federal requirements regarding lead-based paint activities. As such, Air Force personnel and contractors must be trained and certified under the provisions of 40 C.F.R. Subpart L if they engage in “lead-based paint activities”. However, the phrase “lead-based paint activities” is somewhat limited in scope and only includes lead-based paint inspections,<sup>87</sup> risk assessments<sup>88</sup> and abatement activities.<sup>89</sup> 40 C.F.R. Subpart L is “not intended to regulate all activities that involve or disturb lead-based paint ... [and] would not regulate a renovation contractor that incidentally disturbs lead-based paint or an individual who samples paint on a kitchen cabinet to determine if the paint contains lead.”<sup>90</sup> The regulation primarily limits the applicability of the training and certification requirements by restricting the definition of abatement. The definition of abatement specifically excludes “renovation, remodeling, landscaping or other activities, when such activities are not designed to permanently eliminate lead-based paint hazards, but, instead, are designed to repair, restore, or remodel a given structure or dwelling, even

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<sup>86</sup> 15 U.S.C. §2688 (1994)

<sup>87</sup> Inspection is defined as “a surface-by-surface investigation to determine the presence of lead-based paint and the provision of a report explaining the results of the investigation.” 61 Fed. Reg. 45778, 45815 (1996) (to be codified at 40 C.F.R. §745.223)

<sup>88</sup> Risk assessment is defined as “(1) an on-site investigation to determine the existence, nature, severity, and location of lead-based paint hazards, and (2) the provision of a report by the individual or the firm conducting the risk assessment, explaining the results of the investigation and options for reducing lead-based paint hazards.” 61 Fed. Reg. 45778, 45815 (1996) (to be codified at 40 C.F.R. §745.223)

<sup>89</sup> 61 Fed. Reg. 45778, 45813-4 (1996) (to be codified at 40 C.F.R. §745.223)

<sup>90</sup> 61 Fed. Reg. 45778, 45779 (1996)

though these activities may incidentally result in a reduction or elimination of lead-based paint hazards.”<sup>91</sup> In addition, “interim controls, operations and maintenance activities, or other measures and activities designed to temporarily, but not permanently, reduce lead-based paint hazards”<sup>92</sup> are not included in the definition of abatement. As such, the lead-based paint training and certification requirements do not affect normal day-to-day repair and maintenance activities in Air Force housing. The Air Force should not require contractors or personnel to be certified before performing actions involving lead-based paint unless those actions are included within the narrow definitions of inspection, risk assessment or abatement.<sup>93</sup>

Although the EPA is responsible for the lead-based paint training and certification program, TSCA §404 allows states to administer and enforce the requirements of the program.<sup>94</sup> The regulations authorizing state-run training and certification programs will be codified at 40 C.F.R. Subpart Q.<sup>95</sup> Because state programs may be more stringent than the federal program,<sup>96</sup> Air Force installations must be cognizant of local requirements prior to proceeding with any work that may disturb lead-based paint.

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<sup>91</sup> 61 Fed. Reg. 45778, 45814 (1996) (to be codified at 40 C.F.R. §745.223)

<sup>92</sup> *Id.*

<sup>93</sup> As a cautionary note, the Air Force must be careful that performance of the contract will not require a certified lead-based paint contractor. If a non-certified contractor subsequently discovers that a lead-based paint certification is required to perform the contract, the Air Force may incur substantial cost to modify or terminate the contract.

<sup>94</sup> 15 U.S.C. §2684(a) (1994)

<sup>95</sup> 61 Fed. Reg. 45778, 45825-30 (1996) (to be codified at 40 C.F.R. §§745.320 - 745.339)

As with the disclosure rule, nothing in the lead-based paint training and certification program “requires that the owner or occupant undertake any particular lead-based paint activity.”<sup>97</sup>

### **(3) DISPOSITION OF FEDERALLY OWNED HOUSING**

Section 1013 (which applies only to federally owned housing that is being sold) is the only provision in Title X that requires the Air Force to inspect or abate of lead-based paint hazards in housing.<sup>98</sup> However, even these requirements are not absolute because “[i]n the absence of appropriations sufficient to cover the costs [of §1013], these requirements shall not apply to the affected agency or agencies.”<sup>99</sup>

Section 1013 requires the inspection and abatement of lead-based paint hazards in federally owned target housing if the housing was constructed prior to 1960 and the housing is being disposed of by the federal agency.<sup>100</sup> The proposed regulation implementing §1013 explains that the term “disposal” means “sale”.<sup>101</sup> Federally owned housing constructed from 1960 to 1978 need only be inspected for lead-based paint and lead-based paint hazards. The results of the inspection must be made available to prospective purchasers.<sup>102</sup> Thus, under federal law, the Air Force is only required to abate lead-based paint hazards if it is

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<sup>96</sup> 15 U.S.C. §2684(e) (1994)

<sup>97</sup> 61 Fed. Reg. 45778, 45813 (1996) (to be codified at 40 C.F.R. §745.220)

<sup>98</sup> 15 U.S.C. §4822(a)(3) (1994)

<sup>99</sup> 15 U.S.C. §4822(a)(3)(C) (1994)

<sup>100</sup> 15 U.S.C. §4822(a)(3)(A) (1994)

<sup>101</sup> 61 Fed. Reg. 29170, 29179 & 29209 (1996)

selling housing constructed prior to 1960. The Air Force is only required to inspect for lead-based paint if it is selling housing constructed prior to 1978.

These requirements are not altogether new. The 1973 Amendments to the Lead-Based Paint Poisoning Prevention Act required the Secretary of Housing and Urban Development to “establish and implement procedures to eliminate the hazards of lead based paint poisoning in all federally owned property prior to the sale of such properties when their use is intended for residential habitation.”<sup>103</sup> Section 1013 was intended “to clarify the responsibility of federal agencies with regard to lead-based paint hazards in housing sold or transferred to private owners.”<sup>104</sup> In fact, Title X decreases the requirements imposed on federal agencies when selling housing. Under Title X, federal agencies are only required to abate lead-base paint hazards in housing constructed prior to 1960. Under the 1973 Amendments, federal agencies were required to abate such hazards in all residential housing constructed prior to 1978.<sup>105</sup> Another difference between Title X and the 1973 Amendments is that Title X applies to “target housing” and the 1973 Amendments applied to “properties intended for residential habitation”. The scope of the 1973 Amendments was broader than Title X because the 1973 Amendments not only apply to housing, but also apply to non-dwelling facilities commonly used by children under seven years of age, such as a child care

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<sup>102</sup> 42 U.S.C. §4822(a)(3)(B) (1994)

<sup>103</sup> Pub. L. No. 93-151, 87 Stat. 566 (1973)

<sup>104</sup> S. REP. NO. 332, 102d Cong., 2d Sess. 195 (1992)

<sup>105</sup> 24 C.F.R. §35.56(a) (1991)

centers.<sup>106</sup> Although the main purpose of §1013 was to clarify federal responsibilities with regard to lead-based paint hazards in housing, it also reduced those responsibilities.

In implementing the abatement provisions of §1013, the Air Force commonly tries to transfer the abatement requirement to the purchaser as a condition of sale.<sup>107</sup> Title X is silent as to which party should conduct abatement activities. The statute merely states that the implementing regulations “shall require the inspection and abatement of lead-based paint hazards in all federally owned target housing constructed prior to 1960.”<sup>108</sup> The legislative history is also silent as to which party should conduct abatement activities.<sup>109</sup> However, the proposed implementing regulation requires the federal agency to “conduct abatement of all identified lead-based paint hazards”.<sup>110</sup> However, this proposed regulation lists one exception: “In the case of a sale to a [non-occupant purchaser],<sup>111</sup> abatement may be made a

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<sup>106</sup> 24 C.F.R. §35.3 (1991)

<sup>107</sup> Interview with Major John W. Coho, Environmental Program Manager, Installations and Logistics, Headquarters United States Air Force (May 15, 1997)

<sup>108</sup> 15 U.S.C. §4822(a)(3)(A) (1994)

<sup>109</sup> S. REP. NO. 332, 102d Cong., 2d Sess. 118-9 (1992) (However, the legislative history is clear that the abatement must be performed. “While the Committee is aware that agencies including HUD have been known to require purchasers to waive their rights under this provision, the Committee views waivers and other tactics to avoid enforcement of the provision as contrary to the intent of the LPPPA as written.” *Id.* at 118.)

<sup>110</sup> 61 Fed. Reg. 29170, 29209 (1996)

<sup>111</sup> In the original text, the phrase was “non-owner occupant purchaser”. However, this makes no sense as a “purchaser” cannot be a “non-owner”. I think the phrase should read “non-occupant purchaser” to be consistent with language used earlier in the proposed rule. 61 Fed. Reg. 29170, 29179 (1996)

condition of sale with sufficient funds escrowed.”<sup>112</sup> Provided the proposed rule is not drastically changed when it is promulgated as a final rule, the Air Force should be able to transfer the §1013 abatement requirement to the purchaser so long as the escrow requirement is fulfilled and the Air Force is not selling directly to the ultimate occupant of the home.

#### **(4) LEAD-BASED PAINT GUIDANCE FROM THE HOUSE APPROPRIATIONS COMMITTEE**

In 1991, the House of Representatives’ Committee on Appropriations became concerned that lead-based paint in military housing posed a health threat to children.<sup>113</sup> The Appropriations Committee directed DoD to screen children of military personnel for elevated blood lead levels and to form a task force on lead-based paint hazards in military housing.<sup>114</sup> The task force was to “develop a comprehensive plan for identifying lead-based hazards in military housing, designate a representative to participate in the Federal interagency task force, and coordinate DOD funding of \$1,000,000 to help support the government-wide interagency effort to develop safe, effective, and economical cleanup methods.”<sup>115</sup> The Appropriations Committee did not direct DoD to inspect or abate lead-based paint in military housing, but rather directed DoD to study the potential hazard via a task force. It is interesting to note that two years later, the Committee on Appropriations criticized DoD for not coordinating with EPA and HUD and for hiring consultants to

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<sup>112</sup> 61 Fed. Reg. 29170, 29209 (1996)

<sup>113</sup> H.R. REP. NO. 95, 102d Cong., 1st Sess. 86 (1991)

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*



“reinvent the same wheel.”<sup>116</sup> The Appropriations Committee subsequently directed “DOD to follow EPA regulations and HUD guidelines related to lead-based paint in housing.”<sup>117</sup>

Although the Appropriations Committee’s recommendations do not have the effect of law, the recommendations are given great deference by DoD. The *Air Force Policy and Guidance on Lead-Based Paint in Facilities*, lists the Report from the Committee on Appropriations as its first reference (ahead of binding laws and regulations) and acknowledges that “Congress directed the Department of Defense (DoD) to take a more active role in ensuring military dependent children are not affected by [lead-based paint] health hazards”.<sup>118</sup> Even though the Appropriations Committee’s directions do not establish any legally binding requirements, they merit mentioning because they appear to have had a significant influence on the Air Force’s lead-based paint policy.

#### **D. HUD GUIDELINES FOR LEAD-BASED PAINT ACTIVITIES**

Section 1017 of Title X requires HUD, after consultation with EPA, the Department of Labor, and the Centers for Disease Control, to issue guidelines for the conduct of federally supported work involving lead-based paint hazards.<sup>119</sup> Federally supported work includes “any lead hazard evaluation or reduction activities conducted in federally owned or assisted housing”.<sup>120</sup> As such, the HUD guidelines,<sup>121</sup> which were issued in June, 1995, are

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<sup>116</sup> H.R. REP. NO. 129, 103d Cong., 1st Sess. 288 (1993)

<sup>117</sup> *Id.*

<sup>118</sup> AF Lead Paint Policy, *supra* note 10, at atch 1, para 4

<sup>119</sup> 42 U.S.C. §4852(c) (1994)

<sup>120</sup> 42 U.S.C. §4851b(9) (1994)

applicable to lead-based paint activities conducted in Air Force housing. However, the guidelines do not impose any mandatory requirements on federal agencies. The guidelines “are not enforceable by law unless a Federal, State, or local statute or regulation requires adherence to [them].”<sup>122</sup> Title X and the proposed implementing regulations do not require federal agencies to comply with the HUD guidelines when conducting lead-based paint activities in federally owned housing.<sup>123</sup> As such, the HUD guidelines merely provide more complete guidance “on *how* activities related to lead-based paint should be carried out and *why* certain measures are recommended.”<sup>124</sup>

Although the HUD guidelines are not mandatory, they should not be ignored. The forthcoming Air Force Instruction and Air Force Manual should use the guidelines as a baseline because they “are based on the most current scientific research”<sup>125</sup> and provide detailed, technical information for identifying and controlling lead-based paint hazards. However, the Air Force Instruction and Manual should allow installations the flexibility to deviate from the guidelines if such deviations are consistent with sound engineering principles and practice.

#### **E. THE AIR FORCE LEAD-BASED PAINT PROGRAM**

Although federal requirements for the Air Force’s lead-based paint program are limited to the disclosure rule, the use of trained and certified personnel for lead-based paint

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<sup>121</sup> HUD Guidelines, *supra* note 3

<sup>122</sup> *Id.* at xix

<sup>123</sup> 61 Fed. Reg. 29170, 29209 (1996)

<sup>124</sup> HUD Guidelines, *supra* note 3, at xix

activities, and various requirements associated with the sale of Air Force housing, the Air Force lead-based paint program is much more comprehensive. Air Force policy requires that each installation develop a lead-based paint management plan that identifies, evaluates, controls and eliminates lead-based paint hazards.<sup>126</sup> Lead-based paint hazards are typically identified through lead-based paint inspections, routine facility inspections, fire and safety inspections, and occupant reports.<sup>127</sup> The condition of the paint and the age of housing occupants are used to evaluate the health risk posed by the lead-based paint.<sup>128</sup> Based on the degree of risk presented, an appropriate response is taken ("closing off the area, occupant relocation, in-place management, abatement and/or cleanup").<sup>129</sup> In-place management is emphasized to control lead-based paint hazards.<sup>130</sup> Installations are to "[c]onsider abatement of lead-based paint as part of the normal facility renovation and upgrade program when it is cost effective."<sup>131</sup> The Air Force approach to lead-based paint hazards also includes testing

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<sup>125</sup> HUD Guidelines, *supra* note 3, at preface

<sup>126</sup> AF Lead Paint Policy, *supra* note 10, at atch 1, para 6.a.

<sup>127</sup> *Id.* at atch 2, para. 7

<sup>128</sup> *Id.* at atch 2, para. 8.c.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at atch 2, para. 6.e. (In-place management is defined as "[i]nterim measures which reduce an LBP hazard to acceptable levels. They include monitoring the condition of painted surfaces and reducing dust by high-phosphate detergent washing or top coating by painting or wall coverings, repairing deteriorating by painting, and performing cleanup activities".)

<sup>131</sup> *Id.* at atch 2, para. 6.f. (Abatement is defined as "[l]ong-term or permanent measures which eliminate the possibility of hazardous exposure by replacement of building components (doors, cabinets, molding, etc.), encapsulation with drywall or siding, and removal.")

of children for elevated blood lead levels,<sup>132</sup> guidance on the disclosure rule<sup>133</sup> and guidance on closing facilities.<sup>134</sup>

While the Air Force policy of identifying, evaluating, controlling and eliminating lead-based paint hazards has proven to be effective, this policy could be improved in the forthcoming Air Force Instruction and Air Force Manual by clearly distinguishing between applicable requirements and information provided for guidance. The Air Force lead-based paint policy lists 13 references but fails to indicate which portions of those references are legally applicable to Air Force housing.<sup>135</sup> For example, the policy lists Title X as a reference but fails to indicate that a vast majority of Title X's provisions are not applicable to the Air Force. This lack of clarity leads to confusion and is a disservice to those trying to comply with federal and Air Force requirements. A better approach would be to specifically list applicable provisions and clearly indicate whether those provisions are requirements or merely guidance. For example, the Air Force should specifically state whether it wants installations to abide by HUD's *Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing*. If the Air Force wants all installations to follow the HUD guidelines, the Air Force Instruction or Air Force Manual should so state. If the Air Force

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<sup>132</sup> Letter from Air Force Medical Operations Agency, *Child Blood Lead Screening Program* (Apr. 2, 1993)

<sup>133</sup> Letter from the Office of The Civil Engineer, Director of Environment, *Policy and Guidance on Lead-Based Paint (LBP) Final Disclosure Rule* (Aug. 19, 1996)

<sup>134</sup> Letter from Principal Assistant Deputy Under Secretary of Defense (Environmental Security), *Asbestos, Lead Paint and Radon Policies at BRAC Properties* (Oct. 31, 1994)

<sup>135</sup> AF Lead Paint Policy, *supra* note 10, at atch 1, para 1

wants base-level engineers to have flexibility in addressing lead-based paint hazards, the Air Force Instruction or the Air Force Manual should make that clear as well. Not clarifying issues (such as the applicability of HUD guidelines) sows seeds for future confusion.

When developing the new Air Force Instruction and Air Force Manual, the Air Force should take advantage of the flexibility that it has been afforded under federal law. Congress has chosen not to impose many restrictions on Air Force housing regarding the management of lead-based paint hazards. This flexibility should be passed on to Air Force installations. The forthcoming Air Force Instruction and Air Force Manual should clearly state the policy of identifying, evaluating, controlling and eliminating lead-based paint in Air Force housing, then allow installations the flexibility to develop prudent, cost-effective methods of implementing that policy.

#### **IV. RCRA AND THE REGULATION OF LEAD-BASED PAINT**

##### **A. WASTE FROM LEAD-BASED PAINT ABATEMENT**

Title X requires the Air Force to abate lead-based paint hazards in housing constructed prior to 1960 that is being sold.<sup>136</sup> In addition, the Air Force may abate lead-based paint hazards in base housing due to public health concerns, a waiver of sovereign immunity, or the threat of tort liability.<sup>137</sup> Depending on the process selected, the abatement

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<sup>136</sup> 42 U.S.C. §4822(a)(3) (1994). Abatement is defined as the removal, containment or encapsulation of lead-based paint and the removal or covering of lead contaminated soil. 42 U.S.C. §4851b(1) (1994)

<sup>137</sup> *E.g.*, *Pierre v. United States*, 741 F.Supp. 306 (D.Mass. 1990) (HUD liable for negligently repainting house which contained lead-based paint that was sold to plaintiff.); *Brooks v. United States*, 712 F.Supp. 667 (N.D.Ill. 1989) (Although judgment entered in

of lead-based paint hazards may generate a variety of wastes, including lead-based paint residues (paint chips and dust), paint-covered debris (woodwork, plaster, bulky components, etc.), soil contaminated by lead-based paint, sludge from stripping paint, wash water, rags, High Efficiency Particle Air (HEPA) vacuum filters, respirator filters, and plastic sheeting to cover floors.<sup>138</sup> Each of these types of wastes must be properly handled in accordance with the provisions of the Resource Conservation and Recovery Act (RCRA).<sup>139</sup>

Congress enacted RCRA to provide a comprehensive program to manage the nation's solid and hazardous wastes. Solid wastes are subject to the requirements of RCRA Subtitle D.<sup>140</sup> Hazardous wastes are managed from "cradle to grave" pursuant to RCRA Subtitle C.<sup>141</sup> Under RCRA Subtitle C, those who generate, transport, treat, store or dispose of hazardous waste, are stringently regulated. If lead-based paint abatement wastes are merely solid waste, regulatory oversight is limited. However, if these wastes are considered hazardous, the panoply of RCRA Subtitle C regulations will drastically increase the complexity and the cost of lead-based paint abatement.

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favor of United States, court acknowledged that United States could be liable under the Federal Tort Claims Act for injuries caused by lead-based paint.)

<sup>138</sup> Brooks, *Legal Considerations of Disposal of Lead-Contaminated Construction Debris*, N.Y.L.J., Jul. 19, 1993, at 1, col. 1

<sup>139</sup> 42 U.S.C. §§6901-6992k (1994)) Lead-based paint wastes must also be handled in accordance with state law. State hazardous waste programs vary from state to state because states may administer and enforce their own hazardous waste programs subject to EPA approval. 42 U.S.C. §6926(a) (1994)

<sup>140</sup> 42 U.S.C. §§6941-49a (1994)

<sup>141</sup> 42 U.S.C. §§6921-39e (1994)

Although the focus of RCRA is primarily prospective, various provisions regulate the remediation of past releases of hazardous wastes and hazardous constituents. These provisions encompass the RCRA corrective action program.<sup>142</sup> Although the RCRA corrective action program principally uses permit conditions for the remediation of past releases, EPA does have the authority to respond to past releases from solid wastes that pose an imminent and substantial threat to human health or the environment. Because of RCRA's corrective action provisions, Air Force installations may be required to remediate past releases of lead-based paint wastes if such releases have not been properly controlled.

### (1) SOLID WASTE

To be regulated under RCRA, lead-based paint wastes must fall within the statutory definition of "solid waste".<sup>143</sup> Under RCRA, solid waste is defined as "any garbage, refuse, ... and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities".<sup>144</sup> RCRA's definition of solid waste is extremely broad<sup>145</sup> and would encompass the wastes generated by lead-based paint

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<sup>142</sup> *Corrective Action Authorities*, OSWER Directive No. 9502.1995(02) (1995). (The RCRA corrective action program includes 42 U.S.C. §6924(u) (permitted TSD facilities), §6924(v) (action beyond the boundary of the facility), §6928(h) (interim status facilities), §6925(c)(3) (omnibus permitting authority), and §6973 (imminent and substantial endangerment))

<sup>143</sup> 42 U.S.C. §6903(27) (1994)

<sup>144</sup> *Id.*

<sup>145</sup> "Solid Waste is a very broad term covering all solid and liquid forms, and some gaseous forms, of household trash, discarded industrial materials, sludge from mining operations, etc. With the exception of wastes regulated under other laws (e.g., nuclear materials), RCRA's definition of solid waste covers just about everything encompassed by a "common sense" definition of waste." 55 Fed. Reg. 14556, 14604 (1990)

abatement. Although there are a few exclusions from the definition of solid waste (e.g., domestic sewage, irrigation return flows, and special nuclear or byproduct material),<sup>146</sup> none of the exclusions are likely applicable to lead-based paint wastes. As a result, the Air Force must ensure that the land disposal of lead-based paint wastes at least complies with the provisions of RCRA Subtitle D.<sup>147</sup> The Subtitle D implementing regulations, known as "Subtitle D Criteria", regulate solid waste disposal facilities<sup>148</sup> and municipal solid waste landfills.<sup>149</sup> The Subtitle D Criteria are designed to reduce, *inter alia*, dangers at landfills associated with flooding,<sup>150</sup> disease,<sup>151</sup> surface and groundwater contamination,<sup>152</sup> and air pollution.<sup>153</sup>

## (2) HAZARDOUS WASTE

Although RCRA addresses both solid and hazardous waste, its primary focus is the management of hazardous waste. Hazardous wastes are solid wastes<sup>154</sup> that "(A)

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<sup>146</sup> 42 U.S.C. §6903(27) (1994); 40 C.F.R. §261.4(a) (1996)

<sup>147</sup> As will be discussed below, the wastes may also have to comply with the more rigorous requirements of RCRA Subtitle C.

<sup>148</sup> 40 C.F.R. Part 257 (1996)

<sup>149</sup> 40 C.F.R. Part 258 (1996)

<sup>150</sup> 40 C.F.R. §§257.3-1, 258.11 (1996)

<sup>151</sup> 40 C.F.R. §§257.3-6, 258.22 (1996)

<sup>152</sup> 40 C.F.R. §§257.3-3, 257.3-4, 258.26, 258.27, 258.50-59 (1996)

<sup>153</sup> 40 C.F.R. §§257.3-7, 258.24 (1996)

<sup>154</sup> 40 C.F.R. §261.2 (1996) Hazardous wastes must be solid wastes under the regulatory definition of solid waste. Solid waste is defined in 40 C.F.R. §261.2 as discarded material



cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.”<sup>155</sup> Hazardous wastes are either specifically listed<sup>156</sup> by the EPA or are solid wastes which exhibit a specified regulatory hazardous characteristic.<sup>157</sup>

Under RCRA, a “generator” is defined as “any person, by site, whose act or process produces hazardous waste identified or listed in [40 C.F.R. §261] or whose act first causes a hazardous waste to become subject to regulation.”<sup>158</sup> One of the initial obligations of a generator is determining whether his waste is considered hazardous waste.<sup>159</sup> A generator

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that is not excluded or granted a variance. A discarded material is any material which is abandoned, recycled or inherently waste-like.

<sup>155</sup> 42 U.S.C. §6903(5) (1994)

<sup>156</sup> “Listed” hazardous wastes are set out in 40 C.F.R. §§261.30-35 (1996). There are four lists of hazardous waste: F listed waste (from non-specific sources), K listed waste (from specific sources, usually manufacturing and processing), P and U listed waste (off-specification or discarded commercial chemical products).

<sup>157</sup> To be considered a “characteristic” hazardous waste, a solid waste must be ignitable (for a liquid, it must have a flash point less than 140 degrees Fahrenheit; for a solid, it is capable of causing a fire through friction, absorption of moisture or spontaneous chemical change, 40 C.F.R. §261.21 (1996)), corrosive (ph less than or equal to 2, or ph greater than or equal to 12.5, 40 C.F.R. §261.22 (1996)), reactive (unstable and readily undergoes violent change without detonating, reacts violently with water, or when mixed with water generates toxic gases, 40 C.F.R. §261.23 (1996)), or toxic (40 C.F.R. §261.24 (1996)).

<sup>158</sup> 40 C.F.R. §260.10 (1996) There are three classes of generators based on the quantity of hazardous waste generated in a calendar month: Conditionally exempt small quantity generators (generate no more than 100 kg of hazardous waste per month, 40 C.F.R. §261.5 (1996)); Small quantity generators (generate more than 100 kg but less than 1000 kg, 40 C.F.R. §262.44 (1996)); and, Large quantity generators (generates 1000 kg or more). A typical Air Force installation is a large quantity generator.

<sup>159</sup> 40 C.F.R. §262.11 (1996)

may make the hazardous waste determination by using either an EPA approved testing method<sup>160</sup> or by "applying knowledge of the hazard characteristic of the waste in light of the materials or the processes used."<sup>161</sup> At Air Force housing, lead-based paint abatement would most likely be conducted by in-house personnel or contractors. In either case, if the waste is hazardous, the Air Force would be considered a generator because it caused, either directly or indirectly, the hazardous waste to be generated. If a contractor is involved in the abatement work, the Air Force and the abatement contractor would be considered co-generators as both parties contribute to the generation of the waste.<sup>162</sup>

#### **(a) CLASSIFYING WASTE FROM LEAD-BASED PAINT ABATEMENT**

Depending on how lead-based paint is abated, either listed or characteristic hazardous waste may be generated. If a solvent is used to remove lead-based paint, the spent solvent may be a F listed hazardous waste or the unused, discarded solvent may be a P listed hazardous waste. In addition, under RCRA's mixture rule, if any solid waste is mixed with one or more listed hazardous wastes, the resulting mixture will be considered a hazardous waste as well.<sup>163</sup> As a result, any rags or other material contaminated

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<sup>160</sup> 40 C.F.R. §262.11(c)(1) (1996)

<sup>161</sup> 40 C.F.R. §262.11(c)(2) (1996)

<sup>162</sup> 61 Fed. Reg. 45778, 45798 (1996)

<sup>163</sup> 40 C.F.R. §261.3(a)(2)(ii), (iii) (1996) (However, if a solid waste is mixed with a listed waste that is listed only because it exhibits a hazardous characteristic, the resulting mixture is not considered hazardous waste if the resulting mixture no longer exhibits the hazardous characteristic. Mixed wastes (except wash water) are still subject to the Land Ban (40 C.F.R. subpart 268) even if they no longer exhibit a hazardous characteristic at the point of land disposal.)

with a listed hazardous waste during the lead-based paint abatement process may be considered hazardous. As such, the mixture rule has the potential to drastically expand the amount of waste subject to RCRA Subtitle C regulation.

A solid waste may also be considered hazardous waste if it exhibits a hazardous characteristic.<sup>164</sup> For wastes associated with lead-based paint abatement, the hazardous characteristic of concern is toxicity for lead. A solid waste is considered toxic for lead, if the lead content of the leachate from a representative sample of the waste exceeds 5 mg/L using the Toxicity Characteristic Leaching Procedure (TCLP) test.<sup>165</sup> According to the Department of Housing and Urban Development's *Interim Guidelines for Hazard Identification and Abatement in Public and Indian Housing*, test data from a HUD lead-based paint demonstration project indicated that it is unlikely that large debris such as doors will be classified as hazardous.<sup>166</sup> The interim guidelines however also state that "paint chips, HEPA vacuum filters, and certain wash waters are likely to fail the toxicity test".<sup>167</sup> EPA conducted similar tests on waste from lead-based paint abatement and concluded:

(i) Filtered wash-water, disposable work clothes and respirator filters, and rugs and carpets are non-hazardous and may be disposed of as solid waste.

(ii) Paint chips, HEPA vacuum debris, dust from air filters, paint dust sludge from stripping, unfiltered liquid waste, rags, sponges, mops, HEPA filters, air monitoring cartridges, scrapers and other

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<sup>164</sup> 40 C.F.R. §261.20 (1996)

<sup>165</sup> 40 C.F.R. §261.24 (1996)

<sup>166</sup> 55 Fed. Reg. 14556, 14604 (1990)

<sup>167</sup> *Id.*

materials used for testing, abatement and cleanup may be hazardous or not, depending on the abatement conditions. ...

(iii) "Solid" wastes such as old woodwork, plaster, doors and similar bulky components were found generally to be hazardous when the lead level in the paint exceeded 4 mg/cm<sup>2</sup>, as determined by a laboratory analysis. The same types of waste may be disposed of as solid waste provided they are covered with paint containing lower lead levels.

(iv) Plastic sheeting and tape used to cover floors during abatement may be hazardous, depending on the methods used.<sup>168</sup>

Both the HUD and EPA studies demonstrate that wastes generated by lead-based paint abatement may be hazardous under RCRA. Prior to beginning any lead-based paint abatement project, the Air Force should consider the possibility that some of the waste generated may be hazardous.

It should be noted that "EPA intends to issue a separate rulemaking specifically addressing the disposal of architectural debris waste from lead-based paint abatements."<sup>169</sup> The purpose of the rulemaking would be to "minimize potential regulatory impediments to conducting and financing lead-based paint abatements."<sup>170</sup> Such a rulemaking is long overdue. Lead-based paint is the most common environmental disease in young children<sup>171</sup> and EPA has acknowledged "that the costs associated with managing debris is impeding

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<sup>168</sup> Brooks, *Legal Considerations of Disposal of Lead-Contaminated Construction Debris*, N.Y.L.J., Jul. 19, 1993, at 1, col. 1

<sup>169</sup> 61 Fed. Reg. 45778, 45798 (1996)

<sup>170</sup> *Id.*

<sup>171</sup> 61 Fed. Reg. 29170, 29170 (1996)

progress in reducing lead-based paint hazards.”<sup>172</sup> Yet, EPA has failed to even issue a draft regulation. Such inattention is inexcusable. In addition, the scope of the proposed rulemaking will purportedly address only architectural debris rather than all wastes generated by the most common types of lead-based paint abatement. A regulation which excludes certain lead-based paint abatement wastes from Subtitle C regulation would eliminate a significant barrier to the abatement of lead-based paint. However, until such a regulation is promulgated, the current RCRA regulations will continue to apply.

#### **(b) HOUSEHOLD HAZARDOUS WASTE EXCLUSION FOR LEAD-BASED PAINT ABATEMENT**

When Congress enacted RCRA in 1976, EPA was required to “promulgate criteria for identifying the characteristics of hazardous waste, and for listing hazardous waste, which should be subject to [RCRA Subtitle C requirements]”.<sup>173</sup> Even though the statute does not provide for the exclusion of household wastes, the implementing regulation specifically excluded household wastes from the definition of hazardous waste.<sup>174</sup> EPA excluded household wastes from RCRA to implement Congressional intent as expressed in the legislative history.<sup>175</sup> In 1984, EPA clarified the household hazardous waste

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<sup>172</sup> 61 Fed. Reg. 45778, 45798 (1996)

<sup>173</sup> Pub. L. No. 94-580, §3001, 90 Stat. 2795, 2806 (1976) (codified at 42 U.S.C. §6921(a) (1994))

<sup>174</sup> 40 C.F.R. §261.4(b) (1996) (“The following solid wastes are not hazardous wastes: (1) Household waste, including household waste that has been collected, transported, stored, treated, disposed, recovered ... or reused.”)

<sup>175</sup> 45 Fed. Reg. 33084, 33098-99 (1980) (citing S. REP. NO. 94-988, 94th Cong., 2d Sess. 16 (1976) (“(The hazardous waste program) is not to be used to control the disposal of substances used in households or to extend control over general municipal wastes based on the presence of such substances.”))

exclusion by stating that the applicability of the household hazardous waste exclusion depends on the following two criteria being met: (1) the waste must be generated by homeowners on the premises of a household and (2) the waste must be composed primarily of materials found in the wastes generated by consumers in their homes.<sup>176</sup> EPA further clarified the household hazardous waste exclusion by stating that wastes from building construction, renovation or demolition, even if generated at a household, are not covered under the household waste exclusion.<sup>177</sup> EPA later backed away from the first requirement which stated that household wastes must be generated by a homeowner. In OSWER Directive No. 9441.1990(09), *Applicability of the Household Hazardous Waste Exclusion to Waste Generated by Contractors*, EPA stated that the applicability of the household hazardous waste exclusion is based on the type of waste generated and the place of generation, and that "EPA does not distinguish between waste generated at a household by a homeowner and waste generated at a household by a person other than the homeowner [*e.g.*, a contractor]."<sup>178</sup>

OSWER Directive No. 9443.1994(03) addressed the applicability of the household hazardous waste exclusion to wastes generated by lead-based paint abatement. The Directive states:

Under EPA's current reading of the household waste exemption, LBP waste is not similar to the waste typically generated by household

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<sup>176</sup> 49 Fed. Reg. 44978, 44978 (1984)

<sup>177</sup> *Id.*

<sup>178</sup> *Applicability of the Household Hazardous Waste Exclusion to Waste Generated by Contractors*, OSWER Directive No. 9441.1990(09) (1990)

(e.g., household trash comprising of discarded consumer goods), and should therefore, be evaluated for its potential to be RCRA hazardous waste. However, solid waste generated by a homeowner, resident, or a contractor at a home as part of routine residential maintenance (as opposed to building construction, renovation, and demolition) would be part of the household waste stream, and thus would be covered under the RCRA household waste exemption.<sup>179</sup>

Apparently, if the purpose of an activity is the abatement of lead-based paint, the activity is considered renovation and the resulting wastes are not included in the household hazardous waste exclusion. However, if during routine maintenance (e.g., the chipping and sanding of old paint prior to the repainting), any lead-based paint is abated, the resulting wastes are not considered hazardous under RCRA. In practice, differentiating between routine maintenance and renovation may require the making of some fine distinctions. As such, it would be prudent to coordinate with EPA (or the appropriate state agency) prior to beginning any routine maintenance that may involve the abatement of lead-based paint.

Although current direction from EPA's Office of Solid Waste and Emergency Response does not include wastes from lead-based paint abatement in the household hazardous waste exclusion, such was not always the case. OSWER Directive No. 9443.1987(28), *Lead-Based Paint Residues and Lead Contaminated Residential Soil For Public/Private Housing Units*, published in 1987, stated "[p]aint wastes are exempt from regulation as a hazardous waste if they are generated at individual households by the homeowner doing his own removal."<sup>180</sup> On the other hand, if the removal at an individual

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<sup>179</sup> OSWER Directive No. 9443.1994(03) (1994)

<sup>180</sup> The guidance concerning contractors was superseded by *Applicability of the Household Hazardous Waste Exclusion to Waste Generated by Contractors*, OSWER Directive No. 9441.1990(09) (1990)

residence is done by a contractor, the residues are solid wastes and must be evaluated with respect to their hazardousness (EP Toxicity) and must be disposed of according to hazardous waste regulations if found to be hazardous.”<sup>181</sup> Thus, until 1994, lead-base paint abatement wastes were included in the household waste exclusion and RCRA was not a barrier to lead-based paint abatement. However, in 1994, OSWER Directive No. 9443.1994(03) eliminated the household hazardous waste exclusion for lead-based paint abatement wastes. What is disturbing about this policy change is the lack of explanation. One would think that a significant policy change such as this (*i.e.*, a change which makes it more difficult and expensive to address the number one environmental health hazard facing young children) would be accompanied by a thoughtful, well-reasoned analysis. Instead, the OSWER Directive No. 9443.1994(03) restates the same precedents that justified the 1987 Directive then summarily concludes that “[u]nder EPA’s current reading of the household waste exemption, LBP is not similar to the waste typically generated by [a] household”.<sup>182</sup> Absent a compelling, scientifically-based reason or a clear policy rationale, it is irresponsible for EPA to erect a formidable barrier to the abatement of residential lead-based paint by making it subject to RCRA Subtitle C regulation without any explanation.<sup>183</sup>

#### **(c) SOIL CONTAMINATED WITH LEAD-BASED PAINT**

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<sup>181</sup> *Lead-Based Paint Residues and Lead Contaminated Residential Soil For Public/Private Housing Units*, OSWER Directive No. 9443.1987(28) (1987)

<sup>182</sup> OSWER Directive No. 9443.1994(03) (1994)

<sup>183</sup> Returning to the 1987 interpretation of the household hazardous waste exclusion regarding wastes generated by lead-based paint abatement would obviate the need for the rulemaking noted in paragraph IV.A.(2).(b).



Soil contaminated with lead-based paint may or may not be covered under EPA's current interpretation of RCRA's household hazardous waste exclusion. If routine residential maintenance, or the weathering or chalking of lead-based paint is the source of lead contamination in soil, "then the lead-contaminated soil in residential yards would be part of the household waste stream as defined in the household waste exclusion".<sup>184</sup> As such, the soil is not regulated under RCRA Subtitle C and could be disposed of off-site in accordance with RCRA Subtitle D or managed in place.<sup>185</sup>

If the lead contaminated soil resulted from lead-based paint abatement activities, the soil must be evaluated for toxicity. If the soil is found to be toxic for lead, "RCRA subtitle C regulation would apply to the generation, transportation, treatment, storage, or disposal of [the soil] (absent another exemption)."<sup>186</sup> However, even though the soil is regulated under RCRA Subtitle C, the Air Force may engage in certain on-site, risk reducing activities without such activities being considered generation, treatment, storage or disposal of hazardous waste.<sup>187</sup> For example, according to OSWER Directive No. 9441.1995(08), *Applicability of the Household Waste Exclusion to Lead-Contaminated Soil*, "covering soils with sod, mulch, or gravel would not constitute the generation, transportation, treatment,

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<sup>184</sup> *Applicability of the Household Waste Exclusion to Lead-Contaminated Soil*, OSWER Directive No. 9441.1995(08) (1995)

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

storage, or disposal of hazardous waste".<sup>188</sup> As a result, the Air Force may use these risk reducing measures as a low cost means of mitigating the health hazards associated with lead-contaminated soil without being subject to RCRA Subtitle C regulation.<sup>189</sup>

### (3) LIABILITY UNDER CERCLA

In determining the appropriate method for disposing of wastes from lead-based paint abatement, the Air Force should evaluate potential CERCLA liability as well as RCRA requirements. Even if lead-based paint wastes are disposed of in accordance with the requirements of RCRA, the Air Force may still be liable under CERCLA should the disposal site subsequently pose a threat to human health or the environment.<sup>190</sup> Because liability under CERCLA may be joint and several,<sup>191</sup> the potential liability is staggering for the disposal of any hazardous substance, including lead contaminated wastes. Thus, even

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<sup>188</sup> *Id.*

<sup>189</sup> Under RCRA, "treatment" is defined as "any method, technique or process, including neutralization, designed to change the physical, chemical or biological character or composition of any hazardous waste so as ... to render such waste ... less hazardous". 40 C.F.R. §260.10 (1996). It would appear that adding a soil, mulch or gravel cap to contaminated soil might satisfy the definition of treatment because it is arguably changing the physical character of the soil to make it less hazardous. However, for the purposes of lead-based paint, EPA interprets the definition of treatment narrowly. This narrow interpretation appears to be motivated by a desire to avoid the need for a RCRA permit for on-site abatement activities involving soil contaminated by lead-based paint.

<sup>190</sup> Compliance with environmental laws is not a defense under CERCLA §107, 42 U.S.C. §9607 (1994). *United States v. Pretty Products, Inc.* 780 F.Supp. 1488, 1502 (S.D.Ohio 1991); *United States v. Marisol, Inc.*, 725 F.Supp. 833, 839 (M.D.Pa. 1989). However, there is a narrow exception for federally permitted releases. 42 U.S.C. §9607(j) (1994)

<sup>191</sup> Unless the harm is divisible, CERCLA liability is joint and several. *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1506-8 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057, 110 S.Ct. 1527, 108 L.E.2d 767 (1990); *O'Neil v. Picillo*, 883 F.2d 176 (5th Cir. 1989); *United States v. Chem-Dyne Corp.*, 572 F.Supp. 802 (S.D.Ohio 1983)

though the Air Force could dispose of some lead-based paint abatement wastes as solid waste, a careful evaluation of the potential CERCLA liability is warranted to determine if such disposal is in the Air Force's long-term best interest. The CERCLA ramifications for lead-based paint will be discussed more fully in Part V.

## **B. RCRA CORRECTIVE ACTION<sup>192</sup>**

OSWER Directive No. 9502.1995(02), *Corrective Action Authorities*, lists five statutory provisions which authorize EPA to take corrective action:<sup>193</sup> RCRA §3004(u)<sup>194</sup> (corrective action at permitted TSD facilities); RCRA §3004(v)<sup>195</sup> (corrective action beyond the boundary of the facility); RCRA §3008(h)<sup>196</sup> (corrective action at interim status facilities); RCRA §3005(c)(3)<sup>197</sup> (corrective action using RCRA's omnibus permitting authority); and, RCRA §7003 (corrective action for imminent and substantial endangerment). The RCRA corrective action program addresses releases from interim status

<sup>192</sup> The RCRA corrective action process is not codified in the Code of Federal Regulations. However, the steps outlined in EPA's proposed Hazardous Waste Corrective Action Program, 55 Fed. Reg. 30798 (1990), are used as guidance and are common to most RCRA corrective actions. The corrective action process generally includes: a facility assessment (identification of releases or potential release sites to determine if further information is required), a facility investigation (characterize the nature and extent of contamination at a facility), a corrective measures study (identify a solution for the problem at the site), and corrective measures implementation (implement the solutions). Interim measures may also be required to address sites which pose a threat to human health and the environment or to prevent migration. 55 Fed. Reg. 30798, 30801-2 (1990).

<sup>193</sup> *Corrective Action Authorities*, OSWER Directive No. 9502.1995(02) (1995)

<sup>194</sup> 42 U.S.C. §6924(u) (1994)

<sup>195</sup> 42 U.S.C. §6924(v) (1994)

<sup>196</sup> 42 U.S.C. §6928(h) (1994)

<sup>197</sup> 42 U.S.C. §6925(c)(3) (1994)

facilities, permitted facilities, as well as releases which pose an imminent and substantial threat to health and the environment.

### (1) INTERIM STATUS FACILITIES<sup>198</sup>

To protect human health or the environment, EPA may require corrective action at interim status facilities under RCRA §3008(h) if “there is or has been a release of hazardous waste into the environment”.<sup>199</sup> The term release has been broadly interpreted to include “any spilling, leaking, pumping, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment”.<sup>200</sup> If lead-based paint abatement activities at an interim status facility result in the release of hazardous waste into the environment, EPA may require a corrective action depending on the severity of the release.<sup>201</sup> However, if lead-based paint was released into the environment due to weathering, chalking or routine household maintenance, EPA may not require corrective action under RCRA §3008(h) because there has not been a release of a hazardous waste (*i.e.*, in these circumstances, the lead-based paint would not be a hazardous waste due to the household hazardous waste exclusion).

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<sup>198</sup> 42 U.S.C. §6925(e) (1994)

<sup>199</sup> 42 U.S.C. §6928(h) (1994)

<sup>200</sup> The term “release” is defined in CERCLA §101(22), 42 U.S.C. 9601(22)(1994). However, the CERCLA definition is applicable in RCRA because “release” is considered a term of art in environmental law. *Center for Creative Studies v. Aetna Life and Casualty Co.*, 871 F.Supp. 941, 944 (E.D.Mich. 1994)

<sup>201</sup> *Revised Interim Soil Lead Guidance for CERCLA Sites and RCRA Corrective Action Facilities*, OSWER Directive No. 9355.4-12 (recommends a screening level of 400 ppm for residential soils.)

## (2) PERMITTED FACILITIES<sup>202</sup>

### (a) CORRECTIVE ACTION WITHIN A FACILITY

Unlike interim status facilities, corrective action at permitted facilities is required when hazardous waste or hazardous constituents are released from solid waste management units. Under RCRA §3004(u), EPA “shall require, corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit under [RCRA] regardless of the time at which waste was placed in such a unit.”<sup>203</sup> As such, corrective action at permitted facilities is much broader than at interim status facilities because it includes hazardous constituents. Because lead is a hazardous constituent,<sup>204</sup> waste from lead-based paint abatement could be included in RCRA corrective action at permitted facilities.<sup>205</sup>

Under RCRA §3004(u), only releases from solid waste management units (SWMUs) are subject to corrective action. However, the term “solid waste management unit” is not defined in the statute or in the implementing regulations.<sup>206</sup> However, in the preamble for

<sup>202</sup> 42 U.S.C. §6925 (1994)

<sup>203</sup> 42 U.S.C. §6924(u) (1994). Instead of using 42 U.S.C. §6924(u), EPA could use its omnibus permitting authority, 42 U.S.C. §6925(c)(3) (1994)

<sup>204</sup> 40 C.F.R. Part 261, Appendix VIII (1996)

<sup>205</sup> Because RCRA §3004(u) corrective action includes hazardous constituents, it is irrelevant that some lead-based paint waste may be excluded from regulation under RCRA Subtitle C by the household waste exclusion. As long as abatement waste contains a hazardous constituent (*i.e.*, lead), it is potentially subject to RCRA §3304(u) corrective action.

<sup>206</sup> In 1990, EPA proposed the following definition: “Any discernible unit at which solid wastes have been placed at any time, irrespective of whether the unit was intended for the management of solid or hazardous waste. Such units include any area at a facility at which

the 1985 final Hazardous Waste Management System rule, EPA referred to legislative history and developed the following working definition of a SWMU: "any unit at the facility "from which hazardous constituents might migrate, irrespective of whether the units were intended for the management of solid and/or hazardous wastes.""<sup>207</sup> Courts which have addressed the definition of SWMU have also referred to the legislative history and adopted a similar definition.<sup>208</sup> As such, the definition of SWMU is quite broad and would seem to include any location where there has been a spill of a hazardous waste or hazardous constituent. However, EPA has narrowed the definition in subsequent guidance by stating a SWMU does not include a one-time spill of hazardous waste.<sup>209</sup>

Given the broad definition of SWMU and the fact that lead is a hazardous constituent, it is possible that EPA could consider residential soil that has repeatedly been contaminated by the chipping, peeling or chalking of lead-based paint a SWMU. As such, Air Force installations may be required to remediate the lead-base paint hazards as a condition of their TSD permits. OSWER Directive No. 9355.4-12, *Revised Interim Soil Lead Guidance for CERCLA Sites and RCRA Corrective Action Facilities*, contemplates just such an eventuality. Directive 9355.4-12 recommends a screening level of 400 ppm for lead

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solid wastes have been routinely and systematically released." 55 Fed. Reg. 30798, 30808 (1990). However, this definition was not incorporated into the Code of Federal Regulation.

<sup>207</sup> 50 Fed. Reg. 28702, 28712 (1985) (citing H.R. Rep. No. 198, 98th Cong., 1st Sess., Part 1, 60 (1983))

<sup>208</sup> *Owen Elec. Steel Co. of South Carolina, Inc. v. Browner*, 37 F.3d 146, 148 (4th Cir. 1994); *National-Standard Co. v. Adamkus*, 881 F.2d 352, 355 (7th Cir. 1989)

<sup>209</sup> *Corrective Action Authorities*, OSWER Directive No. 9502.1995(02) (1995)

in residential soils.<sup>210</sup> If the lead contamination exceeds the screening level and poses a health risk, the Directive recommends that it be addressed under the RCRA corrective action program.<sup>211</sup>

### **(b) CORRECTIVE ACTION OUTSIDE A FACILITY**

Under RCRA §3004(v), EPA may require the owner or operator of a permitted facility to take corrective action beyond the boundary of the facility “where necessary to protect human health and the environment”.<sup>212</sup> However, an owner or operator will not be required to perform corrective action outside of the facility if he can demonstrate that he was unable to obtain the necessary permission to undertake such action. Although RCRA corrective action may extend beyond the boundary of a facility, this situation is not likely to occur in connection with residential lead-based paint abatement. Unless a home is close to a property line and the paint is being removed via a sand blasting technique, it is unlikely that the waste will migrate across an installation’s boundary.

### **(3) IMMINENT AND SUBSTANTIAL HARM**

RCRA §7003 gives EPA considerable authority to address “past or present handling, storage, treatment, transportation or disposal of any solid or hazardous waste [which] may present an imminent and substantial endangerment to health or the environment.”<sup>213</sup> EPA “may bring suit on behalf of the United States in the appropriate

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<sup>210</sup> *Revised Interim Soil Lead Guidance for CERCLA Sites and RCRA Corrective Action Facilities*, OSWER Directive No. 9355.4-12

<sup>211</sup> *Id.*

<sup>212</sup> 42 U.S.C. §6924(v) (1994)

<sup>213</sup> 42 U.S.C. §6973 (1994)

district court<sup>214</sup> ... [or] after notice to the affected State, take other action under this section ... as may be necessary to protect public health and the environment.”<sup>215</sup> Because EPA may bring suit under RCRA §7003, this provision is often considered an enforce action rather than corrective action. However, EPA also lists RCRA §7003 as a corrective action authority because its broad powers can be used to remedy past releases of solid and hazardous waste.<sup>216</sup>

Because RCRA §7003 authority encompasses both solid and hazardous wastes, waste from lead-based paint located on an Air Force installation could be the subject of a RCRA §7003 order.<sup>217</sup> However, EPA would have to demonstrate that the lead-based paint waste constitutes an imminent and substantial endangerment to health or the environment.<sup>218</sup>

### C. RCRA CONCLUSION

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<sup>214</sup> This is not meant to imply that EPA may bring suit against the Air Force as such a suit would violate the “Unitary Executive Theory”. *Federal Facilities Hazardous Waste Compliance Manual*, OSWER Directive 9992.4 (1990)

<sup>215</sup> 42 U.S.C. §6973 (1994)

<sup>216</sup> *United States v. Rohm and Haas Co.*, 2 F.3d 1265, 1269 (3rd Cir. 1993)

<sup>217</sup> *McClellan Ecological Seepage Situation (MESS) v. Cheney*, 763 F.Supp. 431, 435 (E.D.Cal. 1988) (“The Government acknowledges that federal facilities are subject to [RCRA §§3004(u), 3008(h) and 7003]”)

<sup>218</sup> *Price v. United States Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994) (“a finding that an activity may present an imminent and substantial harm does not require actual harm.”); *Dague v. City of Burlington*, 935 F.2d 1343, 1355 (2nd Cir. 1991) (“A finding of “imminency” does not require a showing that actual harm will occur immediately so long as the risk of threatened harm is present.”); *United States v. Waste Indus. Inc.*, 734 F.2d 159, 167 (4th Cir. 1984) (“The EPA need not prove that an emergency exists to prevail under section 7003, only that the circumstance may present an imminent and substantial endangerment.”)



Under EPA's current interpretation of RCRA's household hazardous waste exclusion, the abatement of lead-based paint hazards cannot be accomplished without regard for RCRA Subtitle C. As such, the Air Force must take RCRA Subtitle C into account when selecting an appropriate lead-based paint abatement method. If the Air Force selects an abatement method which may generate hazardous waste, great care should be taken to separate the hazardous waste from the non-hazardous waste to minimize the volume, and consequently the cost of the abatement. Failure to account for the possible generation of hazardous waste when abating lead-based paint could result in cost overruns and possible RCRA violations.

#### **V. CERCLA AND THE REGULATION OF LEAD-BASED PAINT IN AIR FORCE HOUSING**

Like many hazardous substances, lead-based paint is regulated by a number of environmental statutes, including the Lead-Based Paint Poisoning Prevention Act, Title X, and RCRA. In addition, the Air Force may have an obligation to address residential lead-based paint hazards under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). For example, at the Presidio of San Francisco, a closing Army installation where there are allegedly "high levels of lead contamination in soil in areas surrounding residential and non-residential structures", the EPA is asserting that soil contaminated with residential lead-based paint should be remediated under CERCLA.<sup>219</sup>

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<sup>219</sup> *Lead-Based Paint Pits EPA Against Army on National Policy Question*, DEFENSE ENVIRONMENT ALERT (1/29/97)

However, the Department of the Army disagrees.<sup>220</sup> This paper will explore the application of CERCLA to Air Force residential lead-based paint hazards.

#### A. CERCLA AT DEPARTMENT OF DEFENSE FACILITIES<sup>221</sup>

CERCLA was made expressly applicable to federal facilities by CERCLA §120.<sup>222</sup> Under CERCLA §120(a)(1), each federal department, agency and instrumentality is required to comply both procedurally and substantively with the provisions of CERCLA to the same extent as any nongovernmental entity.<sup>223</sup> Section 120(a)(1) explicitly states that federal facilities should be subject to CERCLA “in the same manner and to the same extent” as private facilities.<sup>224</sup> As then Representative Fazio, one of the primary authors of CERCLA §120, stated on the eve of SARA passing the House of Representatives, “a State cannot

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<sup>220</sup> *Id.*

<sup>221</sup> Section 211 of the Superfund Amendments and Reauthorization Act (SARA) of 1986, Pub. L. No. 99-499, §211, 100 Stat. 1613, 1719, codified the Defense Environmental Restoration Program (DERP) (10 U.S.C. §§2701-2708 (1994)). Under DERP, the Secretary of Defense is given primary responsibility for all response actions with respect to releases of hazardous substances at facilities or sites owned, leased to, or otherwise possessed by the DoD, and at facilities or sites owned, leased to, or otherwise possessed by the DoD at the time of actions leading to contamination by hazardous substances. 10 U.S.C. §2701(c)(1) (1994). Response actions must be carried out “subject to, and in a manner consistent with, section 120 (relating to federal facilities) of [CERCLA]” and “in consultation with the Administrator of the Environmental Protection Agency”. 10 U.S.C. §§2701(a)(2) & (3) (1994). In addition, DERP incorporates the CERCLA definitions for “release”, “facility”, “person”, “environment” and “hazardous substance”. 10 U.S.C. §2707(1) (1994). Because the DERP must be consistent with CERCLA §120 and incorporates the definitions contained in CERCLA, a separate analysis regarding DoD’s obligation to address residential lead-based paint hazards under DERP is not warranted.

<sup>222</sup> 42 U.S.C. §9620 (1994) (CERCLA §120 was added by SARA, Pub. L. No. 99-499, §120, 100 Stat. 1613, 1666 (1986)).

<sup>223</sup> 42 U.S.C. §9620(a)(1) (1994)

<sup>224</sup> *Id.*

create special rules for Federal facilities that are not otherwise applicable to similar situations at private sites and then expect these rules to be enforced under Superfund.”<sup>225</sup> Thus, while Congress intended federal facilities to comply with CERCLA, Congress did not intend for federal facilities to be subject to a double standard.

However, there are provisions in CERCLA which are only applicable to federal facilities. For example, DoD facilities have an affirmative duty to look for potential CERCLA sites,<sup>226</sup> are required to sign an interagency agreement with EPA for National Priority List (NPL) sites,<sup>227</sup> and are not required to comply with “any requirements relating to bonding, insurance, or financial responsibility.”<sup>228</sup> In addition, DoD, not EPA, has been designated by the President as the lead agency for DoD sites.<sup>229</sup> Pursuant to Executive Order 12580, the President has delegated CERCLA §104 response authority to the Secretary of Defense “with respect to releases or threatened releases, where either the release is on or the sole source of the release is from any facility or vessel under the jurisdiction, custody or control of [the department].”<sup>230</sup>

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<sup>225</sup> 132 Cong. Rec. 29,756 (1986)

<sup>226</sup> 42 U.S.C. §120(d) (1994) (Preliminary assessments were to be completed by April 17, 1988.)

<sup>227</sup> 42 U.S.C. §9620(e)(2) (1994)

<sup>228</sup> 42 U.S.C. §9620(a)(3) (1994)

<sup>229</sup> See, Exec. Order No. 12580, 3 C.F.R. 193 (1988)

<sup>230</sup> *Id.* at para. 2.d., 3 C.F.R. at 195

As the lead agency, DoD is responsible for planning and implementing response actions in accordance with the National Contingency Plan (NCP).<sup>231</sup> Response actions may include, *inter alia*, preliminary assessments,<sup>232</sup> site inspections,<sup>233</sup> remedial investigations,<sup>234</sup> feasibility studies,<sup>235</sup> and remedial designs/remedial actions.<sup>236</sup> At DoD NPL sites, DoD and EPA jointly select the remedy.<sup>237</sup> If DoD and EPA are unable to agree, EPA selects the final remedy.<sup>238</sup> At non-NPL sites, DoD selects the appropriate response actions.<sup>239</sup>

Even though DoD is the lead agency with respect to DoD sites, EPA guidelines, rules, regulations and criteria are still applicable.<sup>240</sup> In addition, DoD “may not adopt or utilize any ... guidelines, rules, regulations, or criteria which are inconsistent with the guidelines, rules, regulations, and criteria established by the Administrator under

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<sup>231</sup> 40 C.F.R. §300.5 (1996) (To recover response costs under CERCLA §107, federal agency response costs must not be inconsistent with the NCP. 42 U.S.C. §9607(a)(4)(A) (1994))

<sup>232</sup> 40 C.F.R. §§300.410(b) & 300.420(b) (1996)

<sup>233</sup> 40 C.F.R. §§300.410(d) & 300.420(c) (1996)

<sup>234</sup> 40 C.F.R. §300.430(d) (1996)

<sup>235</sup> 40 C.F.R. §300.430(e) (1996)

<sup>236</sup> 40 C.F.R. §300.435(b) (1996)

<sup>237</sup> 42 U.S.C. §9620(e)(4) (1994)

<sup>238</sup> *Id.*

<sup>239</sup> Exec. Order No. 12,580, para. 2.d., 3 C.F.R. 193, 195 (1988) (delegating authority under CERCLA §104(a)

<sup>240</sup> 42 U.S.C. §9620(a)(2) (1994)

[CERCLA].”<sup>241</sup> Thus, while DoD is the lead agency at DoD CERCLA sites, its actions are constrained by EPA guidance.<sup>242</sup>

## **B. RESPONSE AUTHORITY UNDER CERCLA §104**

CERCLA §104 establishes the scope of the President’s response authority under CERCLA. CERCLA §104(a)(1) states: “Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment ... the President is authorized to act ... to remove ... and provide for remedial action relating to such hazardous substance”.<sup>243</sup> As such, the President (or his delegate) may not respond to an environmental concern (including lead-based paint hazards) under CERCLA unless the following three conditions are met: (1) a hazardous substance; (2) has been released or there is a threat of such a release; (3) into the environment. Absent one of these elements, the President is not authorized to respond under CERCLA.

### **(1) HAZARDOUS SUBSTANCE**

Under CERCLA, hazardous substances are primarily designated by referring to other environmental statutes (*i.e.*, the Clean Water Act, the Solid Waste Disposal Act, the Clean Air Act, the Toxic Substances Control Act).<sup>244</sup> However, EPA may also designate

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<sup>241</sup> *Id.*

<sup>242</sup> DoD is not subject to EPA guidance concerning removal actions. 42 U.S.C. §9620(a)(2) (1994)

<sup>243</sup> 42 U.S.C. §9604(a)(1) (1994)

<sup>244</sup> 42 U.S.C. §9601(14) (1994)

hazardous substances pursuant to CERCLA §102.<sup>245</sup> CERCLA §102 authorizes EPA to “promulgate and revise as may be appropriate, regulations designating as hazardous substances, ... such elements, compounds, mixtures, solutions, and substances which, when released into the environment may present substantial danger to the public health or welfare or the environment.”<sup>246</sup> EPA used its authority under CERCLA §102 to list lead as a hazardous substance.<sup>247</sup> Because lead is a component of lead-based paint, lead-based paint is considered a hazardous substance under CERCLA.<sup>248</sup>

#### (a) THRESHOLD QUANTITY

CERCLA and its implementing regulations do not list a threshold quantity or a minimum concentration for hazardous substances. Faced with this silence,

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<sup>245</sup> *Id.*

<sup>246</sup> 42 U.S.C. §9602(a) (1994)

<sup>247</sup> 40 C.F.R. §302.4 (1996)

<sup>248</sup> *Louisiana-Pacific Corp. v. ASARCO Inc.*, 24 F.3d 1565, 1573 (9th Cir. 1994) (If product is not specifically listed as hazardous substance, if components include hazardous substances, product is regulated by CERCLA), *cert. denied*, 513 U.S. 1103, 115 S.Ct. 780, 130 L.Ed.2d 674 (1995); *United States v. New Castle County*, 769 F.Supp. 591, 596 (D.Del. 1991) (“When a defendant’s waste is a mixture, like lead-based paint, the dissociation of the hazardous substance from the waste can be presumed and the party disposing of the mixture should be held liable under CERCLA”); *United States v. Carolawn Co.*, 14 Env’tl. L. Rep. 20,696 (D.S.C. 1984) (The defendant argued that water-based paint was not a hazardous substance because water-based paint “is not specifically listed as a hazardous substance under any of the statutory provisions referenced in CERCLA Section 101(14)”. The District Court rejected this argument stating “whether a material is hazardous under CERCLA depends on the character of its constituents. If a waste material contains hazardous substances, then the waste material is itself a hazardous substance for the purposes of CERCLA.”)

courts have declined to impose such a limit.<sup>249</sup> In *Amoco Oil Co. v. Borden, Inc.*,<sup>250</sup> the Court of Appeals for the Fifth Circuit did not impose a quantitative requirement for radium-222 (radium-222 was designated as a hazardous substance pursuant to CERCLA §102).<sup>251</sup> The Fifth Circuit held that “the plain statutory language fails to impose any quantitative requirement on the term hazardous substance and we decline to imply that any is necessary.”<sup>252</sup> The Court of Appeals for the Third Circuit in *United States v. Alcan Aluminum Corp.*,<sup>253</sup> agreed with the Fifth Circuit and held that CERCLA’s definition of hazardous substance “does not, on its face, impose any quantitative requirement or concentration level on the definition of “hazardous substances.””<sup>254</sup> The Third Circuit went on to observe that “courts that have addressed this issue have almost universally held that CERCLA liability does not depend on the existence of a threshold quantity of a hazardous substance.”<sup>255</sup> Because courts have declined to impose a quantity or concentration limit on

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<sup>249</sup> *B.F. Goodrich v. Betkoski*, 99 F.3d 505 (2d Cir. 1996) (In determining whether a substance is hazardous under CERCLA §101(14), quantity or concentration is not a factor.); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1151-52 (1st Cir. 1989) (Listing establishes that a substance is hazardous.); *United States v. Wade*, 577 F.Supp. 1326, 1339-41 (E.D.Pa. 1983) (Listed substance is hazardous regardless of the concentration or amount.)

<sup>250</sup> 889 F.2d 664 (5th Cir. 1989)

<sup>251</sup> *Id.* at 669

<sup>252</sup> *Id.*

<sup>253</sup> 964 F.2d 252 (3rd Cir. 1992)

<sup>254</sup> *Id.* at 260

<sup>255</sup> *Id.*

the term "hazardous substance", the mere presence of lead-based paint on the interior or exterior of a home or in the soil satisfies CERCLA's "hazardous substance" requirement.

## **(2) RELEASE OR THREATENED RELEASE**

### **(a) RELEASE**

In CERCLA, the term "release" is defined as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant) ...".<sup>256</sup> Faced with this expansive definition, courts have justifiably given the term "release" a broad interpretation.<sup>257</sup> In *United States v. Northernair Plating Co.*,<sup>258</sup> the United States brought suit against the Northernair Plating Company under CERCLA to recover response costs associated with a removal action. The United States District Court for the Western District of Michigan concluded that evidence which showed that cyanide, lead, cadmium and other hazardous substances were found in the soil at the Northernair site

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<sup>256</sup> 42 U.S.C. §9601(22) (1994)

<sup>257</sup> *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 668 (5th Cir. 1989) (We believe that the definition of "release" should be construed broadly"); *Washington v. Time Oil Co.*, 687 F.Supp. 529, 531 (W.D.Wash. 1988) ("the presence of hazardous substances on the Time Oil property has resolved to the Court's satisfaction that there clearly has been a "release" within the meaning of CERCLA ... It is enough that the substances are there, and it is not necessary for the purposes of this motion to trace their release to one entity or another."); *United States v. Bliss*, 667 F.Supp. 1298, 1305 (E.D.Mo. 1987) ("the presence of dioxin and TCP in soil at the six sites constitute a release at the six sites.")

<sup>258</sup> 670 F.Supp. 742 (W.D.Mich. 1987) *aff'd*, 889 F.2d 1497 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057, 110 S.Ct. 1527, 108 L.E.2d 767 (1990)



was sufficient to demonstrate that a "release did occur".<sup>259</sup> In *HRW Sys., Inc. v. Washington Gas Light Co.*,<sup>260</sup> the United States District Court of Maryland was even more expansive in its interpretation of the term release. In *HRW Systems*, the plaintiff brought suit under CERCLA to recover response costs for coal-tar that had become located on its property. Regarding the issue of a release, the court held that given "the breadth of the definitional language in CERCLA, it seems virtually impossible to conceive of a situation where hazardous substances are found in the soil and not *ipso facto* "released" into the environment."<sup>261</sup> In light of the broad interpretation of the term "release", it is likely a court would conclude that the presence of lead-based paint in soil constitutes a release under CERCLA.

#### **(b) THREATENED RELEASE**

One court has addressed the issue of whether the flaking of lead-based paint constitutes a threatened release of a hazardous substance. In *ABD Assoc. Ltd. Partnership v. American Tobacco Co.*,<sup>262</sup> the plaintiff brought suit under CERCLA to recover, *inter alia*, the response costs associated with the cleanup of lead-based paint from the exterior of several buildings.<sup>263</sup> The District Court for the Middle District of North Carolina concluded that, assuming that lead-based paint existed on the property, "there was

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<sup>259</sup> *Id.* at 746-47

<sup>260</sup> 823 F.Supp. 318 (D.Md. 1993)

<sup>261</sup> *Id.* at 341

<sup>262</sup> 1995 U.S. Dist. LEXIS 11094 (M.D.N.C. 1995)

<sup>263</sup> *Id.* at 10

no genuine issue of material fact as to whether there was a release or threatened release”<sup>264</sup> because the plaintiff introduced uncontroverted evidence “that the lead-based paint could enter the environment or be emitted into the air”.<sup>265</sup> In this case, the court acknowledged lead-based paint was a hazardous substance under CERCLA and went on to conclude that the mere presence of lead-based paint on the exterior of a building constituted a threatened release into the environment.

### (c) THRESHOLD QUANTITY

The definition of “release”, like the definition of “hazardous substance” does not contain a quantitative limit and courts have been equally reluctant to imply one.<sup>266</sup> In *Burlington Northern R.R. Co. v. Woods Indus., Inc.*,<sup>267</sup> the United States District Court for the Eastern District of Washington held, “nothing in the definition of the term “release” can be construed to require proof of some threshold quantity.”<sup>268</sup> In *Stewman v. Mid-South Wood Prod. of Mena, Inc.*,<sup>269</sup> the Court of Appeals for the Eighth Circuit held “that there is no minimum quantitative requirement to establish a release or threat of a

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<sup>264</sup> *Id.* at 18

<sup>265</sup> *Id.*

<sup>266</sup> *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 668 (5th Cir. 1989) (“the plain statutory language fails to impose any quantitative requirement on the term “release.””); *Mid Valley Bank v. North Valley Bank*, 764 F.Supp. 1377, 1386 (E.D.Cal. 1991) (“CERCLA imposes no quantitative requirement on the term “release,””); *United States v. Western Processing Co., Inc.*, 734 F.Supp. 930, 936 (W.D.Wash. 1990) (“Neither does the statutory definition of “release” contain a threshold requirement.”)

<sup>267</sup> 815 F.Supp. 1384 (E.D.Wash. 1993)

<sup>268</sup> *Id.* at 1390

release of a hazardous substance under CERCLA".<sup>270</sup> As such, a release or threatened release of any quantity or any concentration of a hazardous substance, constitutes a release or threatened release under CERCLA.

### (3) RELEASE INTO THE ENVIRONMENT:

The final requirement for a response action under CERCLA §104 is a release "into the environment".<sup>271</sup> Under CERCLA, the term "environment" includes "land surface or subsurface strata or ambient air within the United States or under the jurisdiction of the United States".<sup>272</sup> As such, the flaking, chipping or chalking of lead-based paint into soil or into the ambient air would be considered a release "into the environment".<sup>273</sup>

However, the phrase "into the environment" does not include the interior of a building.<sup>274</sup> In *G.L. Leasing Co. v. Union Electric Co.*,<sup>275</sup> the Court of Appeals for the Seventh Circuit held that "the release of asbestos inside a building, with no leak outside ...

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<sup>269</sup> 993 F.2d 646 (8th Cir. 1993)

<sup>270</sup> *Id.* at 648

<sup>271</sup> The phrase "into the environment" is redundant in CERCLA §104(a)(1) because the definition of "release" also includes the same phrase. 42 U.S.C. 9601(22) (1994). By definition, a "release" must be "into the environment"

<sup>272</sup> 42 U.S.C. §9601(8) (1994)

<sup>273</sup> *Yellow Freight Sys., Inc. v. ACF Indus., Inc.*, 909 F.Supp. 1290, 1296 (E.D.Mo. 1995) (Presence of asbestos in soil outside building constitutes a release into the environment.); *HRW Sys., Inc. v. Washington Gas Light Co.*, 823 F.Supp. 318, 341 (D.Md. 1993) (hazardous substances in soil are a release into the environment).

<sup>274</sup> *First United Methodist Church v. U.S. Gypsum Co.*, 882 F.2d 862, 868 (4th Cir. 1989) (CERCLA cannot be reasonably interpreted to encompass the asbestos removal problem in buildings), *cert. denied*, 493 U.S. 1070, 110 S.Ct. 1113, 107 L.E.2d 1020 (1990);

<sup>275</sup> 54 F.3d 379 (7th Cir. 1995)

is not governed by CERCLA.”<sup>276</sup> In *Reading Co. v. City of Philadelphia*,<sup>277</sup> the United States District Court for the Eastern District of Pennsylvania observed that “[c]ase law exists supporting the contention that the environment referred to by CERCLA includes the atmosphere external to a building, but not the air within a building.”<sup>278</sup> As a result, it is unlikely a court would extend CERCLA response authority to include the remediation of interior lead-based paint.

#### **(4) LIMITATION OF CERCLA §104:**

CERCLA §104(a)(3)(B) limits the President’s response authority by prohibiting a response action under circumstances where there has been a release or threatened release “from products which are part of the structure of, and result in exposure within, residential buildings or business or community structures”.<sup>279</sup> The provision is clear on its face and courts have interpreted it to preclude a response action under CERCLA when a release from a structure results in exposure within that structure.<sup>280</sup> In *United States v. N.L.*

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<sup>276</sup> *Id.* at 384

<sup>277</sup> 823 F.Supp 1218 (E.D.Pa. 1993)

<sup>278</sup> *Id.* at 1238

<sup>279</sup> 42 U.S.C. §9604(a)(3)(B) (1994). This limitation is subject to exception if the President determines that a release or threatened release “constitutes a public health or environmental emergency and no other person with the authority and capability to respond to the emergency will do so in a timely manner”. 42 U.S.C. §9604(a)(4) (1994)

<sup>280</sup> 3550 Stevens Creek Assocs. v. Barclays Bank of California, 915 F.2d 1355, 1358-9 (9th Cir. 1990) (“Other courts considering this language have concluded that the “environment” referred to in the statute “includes the atmosphere, external to the building,” but not the air within a building.”), *cert. denied*, 500 U.S. 917, 111 S.Ct. 2014, 114 L.Ed.2d. 101 (1991); *Covalt v. Carey Canada, Inc.*, 860 F.2d 1434, 1439 (7th Cir. 1988) (“The interior of a place of employment is not “the environment” for purposes of CERCLA.”); *See*, *First United*

*Indus., Inc.*,<sup>281</sup> the United States District Court for the Southern District of Illinois acknowledged that CERCLA §104(a)(3)(B) prevented EPA from remediating lead-based paint in homes at a NPL site even though EPA was remediating residential soil that had been contaminated by lead from a smelter.<sup>282</sup> Thus, CERCLA §104(a)(3)(B) prohibits response actions for interior lead-based paint but does not preclude response actions for exterior lead-based paint and soil contaminated with lead-based paint.

In the context of exterior lead-based paint and soil contaminated by residential lead-based paint, the language of CERCLA §104(a)(3)(B) is significant because of what it does not say. CERCLA §104(a)(3)(B) was added by Congress in the Superfund Amendments and Reauthorization Act (SARA) of 1986.<sup>283</sup> The purpose of this provision was to limit the scope of CERCLA. The Senate Report concerning CERCLA §104(a)(3) states, "CERCLA response authorities are extremely broad, but there are nevertheless situations, some of

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*Methodist Church v. U.S. Gypsum Co.*, 882 F.2d 862, 868 (4th Cir. 1989), *cert. denied*, 493 U.S. 1070, 110 S.Ct. 1113, 107 L.E.2d 1020 (1990); *California v. Blech*, 976 F.2d 525, 527 (9th Cir. 1992) ("President was not authorized by CERCLA to respond; specifically, when the release or threatened release is (1) from a product that is part of the structure of the building; and (2) the resulting exposure is wholly within the structure.")

<sup>281</sup> 936 F.Supp. 545 (S.D. Ill. 1996)

<sup>282</sup> *Id.* at 554 (The City of Granite City sought to enjoin the clean up of residential soil at a NPL site that was contaminated from the emissions of lead from smelting operations. The City argued, *inter alia*, that irreparable harm would be done if the clean up only addressed lead contaminated soil because "the City's residents [would have] a false sense of security that could result [from] the residents failing to appreciate the health risk of lead-based paint in their homes." In addressing the City's concern, the court explained "CERCLA §104(a)(3)(B) ... precludes the EPA from conducting remedial actions in residential buildings.")

<sup>283</sup> Pub. L. No. 99-499, §104(c), 100 Stat. 1613, 1618 (1986)

which may be life-threatening, which are not within the scope of the law's scope."<sup>284</sup> The Senate Report also states that CERCLA §104(a)(3) "makes more explicit the fact that certain circumstances which may present genuine threats to human health, welfare or the environment are not within the scope of CERCLA."<sup>285</sup> It is clear that Congress intended CERCLA §104(a)(3) to limit the scope of CERCLA. However, prior to SARA being enacted, there was a disagreement between the Senate and House of Representatives regarding the extent to which the scope of CERCLA should be limited. The Senate version of CERCLA §104(a)(3) was eventually adopted.

The House of Representatives version of CERCLA §104(a)(3) contained a much broader limitation to CERCLA response authority by prohibiting the Administrator<sup>286</sup> from responding under CERCLA §104 if there was a "release or threat of a release of a hazardous substance or pollutant or contaminant from residential dwellings or businesses or community structures where such dwellings or structures are not used for the deposition, storage, processing, treatment, transportation, or disposal of hazardous substances."<sup>287</sup> Under the House of Representatives version of CERCLA §104(a)(3), the Administrator would have no authority to respond to a release of hazardous substances from a residential dwelling regardless of whether such a release occurred inside or outside the dwelling. As a result, if Congress had adopted the House of Representatives version, the Administrator

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<sup>284</sup> S. REP. NO. 11, 99th Cong., 1st Sess. 16 (1985)

<sup>285</sup> *Id.* at 15-16

<sup>286</sup> The House of Representatives version used "Administrator" instead of "the President".

<sup>287</sup> H.R. REP. NO. 253, Part V, 99th Cong., 1st Sess. 159 (1985)

would have been precluded from responding under CERCLA to internal or external lead-based paint hazards as well as to soil contaminated by residential lead-based paint.

The Conference Committee, in reconciling the Senate and House of Representatives versions of SARA, adopted the Senate version of §104(a)(3) over the House of Representatives version.<sup>288</sup> In reconciling the two competing versions of the statutory provision, the Conference Committee had to squarely address the issue of whether CERCLA should apply to releases of hazardous substances from residential dwellings. The Conference Committee chose the narrower limitation which only precluded CERCLA response actions for releases within buildings from products within the structure of the building. The choice of the Conference Committee was subsequently adopted by the Congress and indicates that Congress intended CERCLA to regulate releases of hazardous substances from residential dwellings that are not part of the dwelling and not contained within the dwelling. As such, the legislative history of CERCLA §104(a)(3) supports the interpretation that CERCLA may be used to regulate exterior lead-based paint as well as soil contaminated by residential lead-based paint.

### **C. LIABILITY UNDER CERCLA §107**

To establish liability under CERCLA §107, a plaintiff must prove four elements:<sup>289</sup>

- (1) that the defendant is one of the four classes of persons described in CERCLA §107(a)<sup>290</sup>;

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<sup>288</sup> H.R. CONF. REP. NO. 962, 99th Cong., 2d Sess. 190 (1986)

<sup>289</sup> 42 U.S.C. §9606(a) (1994) (Defenses are limited to those outlined in 42 U.S.C. §9607(b) (1994) (an act of God; an act of war; or act or omission by a limited class of third parties))

<sup>290</sup> 42 U.S.C. §9607(a) (1994). The four classes of persons are:  
(1) the owner and operator of a vessel or facility,

(2) the site on which the hazardous substance is located is a "facility"<sup>291</sup>; (3) a release or threatened release of a hazardous substance has occurred from the facility; and, (4) the release or threatened release has caused the plaintiff to incur response costs that were necessary and consistent with the National Contingency Plan (NCP).<sup>292</sup>

At Air Force housing, it is likely that the Air Force will be the only potentially responsible party under CERCLA §107 for response costs associated with the remediation of residential lead-based paint hazards because it is unlikely that there are other past "owners" and "operators" who could share liability. In addition, it is unlikely that the vendors who sold the lead-based paint to the military would be liable because they "arranged for the disposal" of a hazardous substance. Courts have refused to extend CERCLA §107 liability this far generally concluding that the "sale of a product which contains a hazardous substance cannot be equated to the disposal of the hazardous substance itself or even the making of arrangements for its subsequent disposal. ... [Otherwise] the sale of an automobile would be the disposal of a hazardous substance".<sup>293</sup> Under CERCLA §107,

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(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal ... of hazardous substances ... at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substance for transport to disposal or treatment facilities, incineration vessels or sits.

<sup>291</sup> 42 U.S.C. §9601(9) (1994) defines facility as "(A) any building, structure, installation, equipment, pipe ... (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed or otherwise come to be located; but does not include any consumer product in consumer use or any vessel."

<sup>292</sup> For response costs incurred by the United States government, response actions must be necessary and not inconsistent with the NCP. 42 U.S.C. §9607(a)(4)(A) (1994)



DoD is likely to be the sole potentially responsible party. However, liability for lead-based paint hazards is not a foregone conclusion as some provisions of CERCLA limit the scope of CERCLA §107.

### (1) FACILITIES AND CONSUMER PRODUCTS

There is a split among United States Courts of Appeals regarding what constitutes a release or threatened release from a “facility” when such a release involves a consumer product, like lead-based paint. The definition of “facility” specifically excludes “any consumer product in consumer use”.<sup>294</sup> In *Electric Power Bd. of Chattanooga v. Westinghouse Elec. Corp.*,<sup>295</sup> the United States District Court for the Eastern District of Tennessee used the consumer products exemption to dismiss a CERCLA §107 claim even though a hazardous substance (*i.e.*, PCBs) had been released into the environment.<sup>296</sup> The

<sup>293</sup> G.L. Leasing Co., Inc. v. Union Elec. Co., 54 F.3d 379, 384 (7th Cir. 1995); Dayton Indep. School Dist. V. U.S. Mineral Prod., 906, F.2d 1059, 1065 (5th Cir. 1990) (“It is clear that Congress did not intend CERCLA to target legitimate manufactures or sellers of useful products. ... The sale of asbestos-containing products for useful consumption is not the “arranging for disposal” of a hazardous substance at a “facility”.”); See, 3550 Stevens Creek Assocs. v. Barclays Bank of California, 915 F.2d 1355, 1358-9 (9th Cir. 1990) (“no federal court which has considered the placement of asbestos as part of the structure of a building has concluded that it falls within the scope of Scope of Section 107(a).”), *cert. denied*, 500 U.S. 917, 111 S.Ct. 2014, 114 L.Ed.2d. 101 (1991); If placement of asbestos in a building is not disposal of a hazardous substance, then painting a structure with lead-based paint should not be disposal as well.

<sup>294</sup> 42 U.S.C. §9601(9) (1994)

<sup>295</sup> 716 F.Supp. 1069 (E.D.Tenn. 1988)

<sup>296</sup> *Id.* at 1079. *Contra* KN Energy, Inc. v. Rockwell Int’l, Corp., 840 F.Supp. 95, 99 (D.Colo. 1993) (pipeline and natural gas facilities are not consumer products because the consumer products exemption was intended to cover individual consumers, not a business.); Reading Co. v. City of Philadelphia, 823 F.Supp. 1218, 1232-35 (E.D.Pa. 1993) (Railroad car leaking PCBs was not a consumer product.)

Court held that the transformer which leaked PCBs when a nearby piece of electrical equipment exploded was a commercial product in commercial use and therefore not a "facility".<sup>297</sup> Because the PCBs were not released from a facility, there was no liability under CERCLA §107.

In asbestos cases, courts are split concerning whether structures containing asbestos are "facilities" under CERCLA. Some courts have concluded they are not. In *Kane v. United States*,<sup>298</sup> the plaintiff sued the United States under CERCLA after discovering the house which they purchased from the Veteran's Administration contained asbestos.<sup>299</sup> The Court of Appeals for the Eighth Circuit held that the plaintiff's property was not a facility because it "was a consumer product in consumer use and thus exempt under CERCLA."<sup>300</sup> In *Dayton Indep. School Dist. v. U.S. Mineral Prod. Co.*,<sup>301</sup> the Court of Appeals for the Fifth Circuit held that the building "into which the asbestos-containing material were installed, constitute "useful consumer products" within the meaning of the statute" and therefore was not a facility.<sup>302</sup>

Other courts have reached the opposite conclusion.<sup>303</sup> In *California v. Blech*,<sup>304</sup> a tenant brought suit against the landlord for costs of cleaning up asbestos dust accidentally

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<sup>297</sup> Electric Power Bd. of Chattanooga, 716 F.Supp. at 1080

<sup>298</sup> 15 F.3d 87 (8th Cir. 1994)

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at 89

<sup>301</sup> 906 F.2d 1059 (5th Cir. 1990)

<sup>302</sup> *Id.* at 1065

released during a fire.<sup>305</sup> Although ultimately dismissing the suit, the Court of Appeals for the Ninth Circuit held "that structures containing asbestos building material as distinguished, for example, from containers of such materials for consumer use, satisfy the broad definition of "facility" in CERCLA section 101(9)."<sup>306</sup> In *C.P. Holdings, Inc. v. Goldberg-Zoino and Assocs., Inc.*,<sup>307</sup> the United States District Court for New Hampshire held that the defendant's "second argument, that the building itself is a consumer product for the purposes of CERCLA is equally without merit."<sup>308</sup>

Based on the foregoing case law, it is uncertain whether a house painted with lead-based paint would be considered a "facility". If a court follows the reasoning in *Dayton Indep. School Dist.* and *Kane*, a house painted with lead-based paint would be considered a consumer product in consumer use and therefore not a facility. As such, any release or threatened release of lead-based paint from a home would not constitute a release or threatened release from a facility and therefore no liability would attach under CERCLA §107. However, if a court follows the reasoning in *Blech* and *CP Holding*, a house would be

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<sup>303</sup> *Yellow Freight Sys., Inc. v. ACF Indus., Inc.*, 909 F.Supp. 1290, 1296 (E.D.Mo. 1995) ("Structures containing asbestos building materials satisfy the broad definition of "facility" in CERCLA"); *National R.R. Passenger Corp., v. New York City Hous. Auth.*, 819 F.Supp. 1271, 1276 (S.D.N.Y. 1993) (Buildings containing asbestos are facilities for CERCLA purposes.)

<sup>304</sup> 976 F.2d 525 (9th Cir. 1992)

<sup>305</sup> *Id.* at 526

<sup>306</sup> *Id.* at 527

<sup>307</sup> 769 F.Supp. 432 (D.N.H. 1991)

<sup>308</sup> *Id.* at 439

a facility (*i.e.*, not a consumer product) and CERCLA §107 liability would attach. In *ABD Assocs. Ltd. Partnership*, the United States District Court for the Middle District of North Carolina did not analyze the issue of whether a building coated with lead-based paint was a consumer product. Instead, the court summarily concluded that it “is undisputed that the site in question is a “facility” as defined by 42 U.S.C. §9601(9)”.<sup>309</sup>

## (2) THRESHOLD QUANTITY

Although courts have not imposed a threshold quantity or concentration limit for the terms “hazardous substance” and “release” under CERCLA §104, some courts have held that the “necessary response cost” language of CERCLA §107 does impose such a requirement.<sup>310</sup> In *Amoco Oil Co., Inc. v. Borden, Inc.*,<sup>311</sup> the Court of Appeals for the Fifth Circuit, held that response cost are necessary only if they remediate “a release threatening the public health or the environment.”<sup>312</sup> The court went on to explain that any release threatens the public health and the environment if it violates “any applicable state or federal

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<sup>309</sup> *ABD Assocs. Ltd. Partnership v. American Tobacco Co.*, 1995 U.S. Dist LEXIS 11094, 11 (M.D.N.C. 1995)

<sup>310</sup> *Stewman v. Mid-South Wood Prod. of Mena, Inc.*, 993 F.2d 646, 649 (8th Cir. 1993) (“a “factual inquiry” is required in order to determine whether the particular hazard justifies any response action”.); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 266 (3rd Cir. 1992) (“the Government must simply prove that the defendant’s hazardous substances were deposited at the site from which there was a release and that the release caused the incurrence of response costs.”); *Jastram v. Phillips Petroleum Co.*, 844 F.Supp. 1139, 1141 (E.D.La. 1994); *contra*, *United States v. Western Processing Co., Inc.*, 734 F.Supp. 930, 942 (W.D.Wash. 1990)

<sup>311</sup> 889 F.2d 664 (5th Cir. 1989)

<sup>312</sup> *Id.* at 670

standard."<sup>313</sup> Response costs for releases which do not violate a federal or state standard are not necessary and therefore not recoverable under CERCLA §107. For lead-based paint hazards, EPA's screening level for lead concentration in residential soil is 400 ppm.<sup>314</sup> There is no generally applicable, quantitative federal standard which requires the remediation of interior or exterior lead-based paint.

#### **D. EPA GUIDANCE**

EPA's guidance concerning lead-based paint hazards has been somewhat contradictory. Two EPA guidance documents indicate that soil contaminated by lead-based paint may be remediated under CERCLA.<sup>315</sup> However, one guidance document implies just the opposite.<sup>316</sup>

##### **(1) OSWER DIRECTIVE NO. 9355.4-12: REVISED INTERIM SOIL LEAD GUIDANCE FOR CERCLA SITES AND RCRA CORRECTIVE ACTION FACILITIES.**

OSWER Directive No. 9355.4-12, dated July 14, 1994, is EPA's current guidance on lead contaminated soils at NPL sites and recommends a screening level of 400 ppm for residential land use.<sup>317</sup> For lead contamination below this level, a response under

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<sup>313</sup> *Id.* at 671

<sup>314</sup> *Revised Interim Soil Lead Guidance for CERCLA Sites and RCRA Corrective Action Facility*, OSWER Directive, No. 9355.4-12

<sup>315</sup> *Id.*; *Guidance on Identification of Lead-Based Paint Hazards*, 60 Fed. Reg. 47248 (1995)

<sup>316</sup> *Guidance on Non-NPL Removal Actions Involving Nationally Significant or Precedent-Setting Issues*, OSWER Directive, No. 9360.0-19

<sup>317</sup> *Revised Interim Soil Lead Guidance for CERCLA Sites and RCRA Corrective Action Facility*, OSWER Directive, No. 9355.4-12

CERCLA is generally not recommended.<sup>318</sup> However, for lead concentrations which are greater than 400 ppm and pose a health risk, Directive No. 9355.4-12 recommends that the soil be remediated.<sup>319</sup> This recommendation does not consider the source of the lead in the soil. If lead is present in the soil at an NPL site in concentrations greater than 400 ppm, Directive No. 9355.4-12 recommends that it be addressed under CERCLA. Directive No. 9355.4-12 does not distinguish between soil contaminated by lead-based paint and soil contaminated by another source of lead.

Directive No. 9355.4-12 also asserts that EPA has authority to remediate exterior lead-based paint under CERCLA. However, the Directive states that exterior lead-based paint should be remediated "only in conjunction with soil".<sup>320</sup> The reason for this limitation is not provided in the text. On one hand, EPA is clearly indicating that it has authority under CERCLA to address exterior lead-based paint. However, EPA is also clearly recommending that this authority not be exercised to the maximum extent possible. This constraint may be based on EPA's reluctance to take enforcement actions against owners of residential property.<sup>321</sup>

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<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *Policy Towards Owners of Residential Property at Superfund Sites*, OSWER Directive, No. 9834.6 ("EPA, in the exercise of its enforcement discretion, will not take enforcement action against an owner of residential property to require such owner to undertake response actions or pay response costs, unless the residential homeowner's activities lead to a release or threatened release of hazardous substances, resulting in the taking of response action at the site.")

Finally, the Directive acknowledges that "interior exposures from interior paint generally are not within the jurisdiction of ... CERCLA."<sup>322</sup>

**(2) GUIDANCE ON IDENTIFICATION OF LEAD-BASED PAINT HAZARDS.<sup>323</sup>**

Under Title X, EPA is required to identify residential lead-based paint hazards.<sup>324</sup> On July 14, 1994,<sup>325</sup> EPA issued interim guidance concerning these hazards and explicitly stated that the guidance was "not to be applied in addressing potential threats from lead at CERCLA and RCRA Corrective Action sites. Guidance developed by the Office of Solid Waste and Emergency Response is the appropriate tool for addressing these types of sites."<sup>326</sup> Thus, the interim guidance for Title X also acknowledges EPA's authority under CERCLA to address lead-based paint hazards at NPL sites.

**(3) OSWER DIRECTIVE NO. 9360.0-19, GUIDANCE ON NON-NPL REMOVAL ACTIONS INVOLVING NATIONALLY SIGNIFICANT OR PRECEDENT-SETTING ISSUES.**

Headquarters EPA issued OSWER Directive No. 9360.0-19 to the Regional Offices to control nationally significant or precedent-setting removal actions at non-NPL

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<sup>322</sup> *Revised Interim Soil Lead Guidance for CERCLA Sites and RCRA Corrective Action Facility*, OSWER Directive, No. 9355.4-12 (The Directive also states "CERCLA [has] very limited authority regarding the clean up of interior paint". Apparently, the use of the terms "generally" and "limited" refers to CERCLA §104(a)(4) which gives the President the discretion to respond to a release or threatened release of a hazardous substance that constitutes a public health or environmental emergency. However, this is not stated in the Directive. Absent CERCLA §104(a)(4) authority, a review of case law reveals that EPA has no authority to remediate interior lead-based paint under CERCLA.)

<sup>323</sup> 60 Fed. Reg. 47248 (1995)

<sup>324</sup> 15 U.S.C. §2683 (1994)

<sup>325</sup> The interim guidance was republished on Sept. 11, 1995, 60 Fed. Reg. 47248 (1995)

sites. Directive No. 9360.0-19 required Headquarters EPA concurrence before a Regional Office could proceed with certain categories of removal actions. One such category was "[r]emoval actions at sites involving releases from consumer products in consumer uses (e.g., lead-contaminated soil resulting from peeling lead-based paint on houses)."<sup>327</sup>

Directive No. 9360.0-19 went on to explain that "HQ concurrence will ensure that the Agency avoids a commitment to the cleanup of widespread non-point source contamination that is beyond the intended scope of CERCLA."<sup>328</sup> Directive No. 9360.0-19 clearly implies that EPA in 1989 considered the remediation of soil contaminated by residential lead-based paint beyond the scope of CERCLA.<sup>329</sup>

#### **E. PAST PRACTICES - RECORDS OF DECISIONS (ROD)**

According to EPA, "[l]ead is commonly found at hazardous waste sites and is a contaminant of concern at approximately one-third of the sites on the National Priority List."<sup>330</sup> Yet, a search of LEXIS' ENVIRN-ROD database and WESTLAW's EDR-ROD database revealed no RODs addressing exterior lead-based paint or soil contaminated by

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<sup>326</sup> 60 Fed. Reg. 47248, 47249 (1995)

<sup>327</sup> *Guidance on Non-NPL Removal Actions Involving Nationally Significant or Precedent-Setting Issues*, OSWER Directive, No. 9360.0-19

<sup>328</sup> *Id.*

<sup>329</sup> Although the scope of Directive No. 9360.0-19 is limited to removal actions at non-NPL sites, the underlying rationale for the policy (*i.e.*, that lead-contaminated soil resulting from peeling lead-based paint on houses is beyond the intended jurisdiction of CERCLA) would seem to be equally applicable to all response actions at NPL sites.

<sup>330</sup> *Interim Guidance on Establishing Soil Lead Cleanup Levels at Superfund Sites*, OSWER Directive, No. 9355.4-02



residential lead-based paint.<sup>331</sup> One ROD specifically excluded soil which had been contaminated by residential lead-based paint. The Commencement Bay - Nearshore/Tideflats ROD, dated June 1993, addressed an NPL site encompassing an area of approximately one mile radius around a lead smelter.<sup>332</sup> The NPL site was primarily residential and included approximately 1,820 housing units.<sup>333</sup> In response to a public comment concerning the cleanup of lead contamination in soils, the ROD stated:

It is possible that some exceedances of 500 ppm soil lead may occur in the Study Area unrelated to releases from the Asarco smelter. Under this remedial action, EPA will take or compel remedial actions at the site that address current contamination from smelter operations and releases, but not similar contamination resulting from other sources, such as lead-based paints or automotive emissions, that are widespread. The Superfund law limits the extent to which EPA can address releases from these other sources (see CERCLA §101(22) and §104(a)(3)).<sup>334</sup>

In this ROD, Region X stated that a response action for soils contaminated with residential lead-based paint was outside the scope of CERCLA. This assertion is consistent with OSWER Directive No. 9360.0-19 but contrary to the legal position outlined the following

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<sup>331</sup> The ROD for the National Zinc Corporation site (an area within a three mile radius of the smelting facilities, including residential properties) in Bartlesville, Oklahoma, recognized lead "may also have other non-smelter related sources in a typical urban environment", and acknowledged that "peeling or chalking lead-based paint" from homes may be an important exposure pathway. However, the ROD did not attempt to differentiate the lead contamination due to residential lead-based paint.

<sup>332</sup> Commencement Bay-Nearshore/Tideflats ROD, June, 1993

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

year in OSWER Directive No. 9355.4-12. Obviously, one of the two legal positions is mistaken concerning the intended scope of CERCLA.

#### **F. SPECIFIC STATUTE EXCLUDING A GENERAL STATUTE**

As a general rule of statutory construction, "when two statutes arguable apply to the same subject matter, the more specific statute applies to the exclusion of the general statute".<sup>335</sup> Because the Lead-Based Paint Poison Prevention Act (as amended by Title X) and CERCLA potentially apply to Air Force residential lead-based paint hazards, it is arguable the specific lead-based paint statute excludes the general statute. However, the aforementioned rule of statutory construction is contrary to "the cardinal principle of statutory construction that repeals by implication are not favored."<sup>336</sup> As a result, "[t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intent to the contrary, to regard each as effective."<sup>337</sup> Thus, absent clear Congressional intent, courts are required to regard both the Lead-Based Paint Poisoning Prevention Act and CERCLA as applicable to Air Force lead-based paint hazards.

However, courts need not struggle with the doctrine of repeal by implication in the context of residential lead-based paint hazards. Congress has explicitly allowed EPA to regulate lead-based paint hazards by stating "[t]his section may not be construed to affect the

<sup>335</sup> *AMREP Corp. v. F.T.C.*, 768 F.2d 1171, 1176 (10th Cir. 1985), *cert. denied*, 475 U.S. 1034, 106 S.Ct. 1167, 89 L.Ed.2d 352 (1986)

<sup>336</sup> *United States v. Continental Tuna Corp.*, 425 U.S. 164, 168-169, 96 S.Ct. 1319, 1322-23, 47 L.Ed.2d 653 (1976)

<sup>337</sup> *Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 2483, 41 L.Ed.2d 290 (1974)

responsibilities of the Environmental Protection Agency with respect to the protection of the public health from hazards posed by lead-based paint."<sup>338</sup> Thus, even though the provisions of the Lead-Based Paint Poison Prevention Act and CERCLA may at times overlap, the plain language of the Lead-Based Paint Poisoning Prevention Act makes it unlikely that a court will conclude that Congress intended it to preclude the application of CERCLA to residential lead-based paint hazards.

#### G. CERCLA CONCLUSION

Based on the broad statutory language of CERCLA and the expansive interpretation given to it by federal courts, it appears CERCLA §104 response authority (and possibly CERCLA §107 liability) extends to exterior lead-based paint and soil contaminated by residential lead-based paint. However, it is also appears that EPA has been extremely reluctant to use this authority. Until Region IX singled out the Department of the Army at the Presidio, EPA has never tried to use CERCLA to address residential lead-based paint hazards at NPL sites. The question becomes whether the Air Force, as the lead agency at Air Force sites, should do so now.

OSWER Directive No.9355.4-12, *Revised Interim Soil Lead Guidance for CERCLA Sites and RCRA Corrective Action Facilities*, and the interim guidance for Title X both recommend that lead-based paint hazards be addressed under CERCLA at NPL sites. Because EPA guidance is applicable to the Air Force via CERCLA §120(a), it would appear the Air Force should use CERCLA to address residential lead-based paint hazards at NPL sites.

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<sup>338</sup> 42 U.S.C. §4822(g) (1994)

However, CERCLA §120(a) also states that federal agencies “shall be subject to, and comply with [CERCLA] in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity”.<sup>339</sup> When Congress enacted CERCLA §120, it was clearly concerned about federal facilities being held to a double standard. Yet, EPA is apparently promoting this type of double standard. EPA appears to be trying to hold federal facilities to a higher standard regarding the remediation of residential lead-based paint hazards at NPL sites. The Air Force, as the lead agency, has an obligation to resist the imposition of double standards and should try to ensure that federal facilities comply with CERCLA to the same extent as any nongovernmental entity. As such, the Air Force should not follow EPA guidance documents which recommend addressing residential lead-based paint hazards under CERCLA at NPL sites, but instead follow the precedent established by years of EPA enforcement. The Air Force should not use CERCLA to remediate residential lead-based paint hazards until EPA consistently uses CERCLA to address residential lead-based paint hazards at nongovernmental NPL sites. Instead, the Air Force should continue to identify, evaluate, control and eliminate lead-based paint hazards in accordance with its established lead-based paint policy<sup>340</sup> as this policy has proven to be effective.

## VI. STATE LEAD-BASED PAINT PROGRAMS

In 1978, President Carter signed Executive Order No. 12088<sup>341</sup> which required all federal facilities to comply with “applicable pollution control standards”, including state and

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<sup>339</sup> 42 U.S.C. §9620(a)(1) (1994)

<sup>340</sup> AF Lead Paint Policy, *supra* note 10, at atch 1, para. 6.a

local pollution control standards.<sup>342</sup> As a result of Executive Order No. 12088, federal facilities are required to comply with state and local lead-based paint laws. According to Executive Order No. 12088, if an Executive agency is notified by a state or local agency that it is in violation of a pollution control standard, "the Executive agency shall promptly consult with the notifying agency and provide for its approval a plan to achieve and maintain compliance with the applicable pollution control standard."<sup>343</sup> However, Executive Order No. 12088 is not enforceable by any party, including federal or state agencies, and does not provide for sanctions for noncompliance.<sup>344</sup> As a result, federal facilities did not vigorously implement the Executive Order. Regardless of whether Executive Order No. 12088 is enforceable, federal facilities are still obligated to abide by its provisions and comply with state and local lead-based paint laws.<sup>345</sup>

Although state and local agencies may not enforce Executive Order No. 12088, such agencies may enforce their laws and regulations against a federal facilities if Congress has enacted a valid waiver of sovereign immunity.

#### **A. SOVEREIGN IMMUNITY**

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<sup>341</sup> Exec. Order No. 12088, 3 C.F.R. 243 (1979)

<sup>342</sup> *Id.*

<sup>343</sup> *Id.* at 1-601

<sup>344</sup> Exec. Order No. 12580, 3 C.F.R. 193 (1988) (Executive Order No. 12580 amended Executive Order 12088 by renumbering the current section 1-802 as 1-803 and adding the following as 1-802: "Nothing in this Order shall create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.")

<sup>345</sup> The relationship between Executive Order No. 12088 and the discretionary function exception to the Federal Tort Claims Act is discussed in note 419

The doctrine of sovereign immunity has been traced to the English concept of royal supremacy, *i.e.*, "the king can do no wrong".<sup>346</sup> Because the king could do no wrong, he could not be sued under English common law without his consent.<sup>347</sup> Courts in the United States adopted the doctrine of sovereign immunity even though the country has never had a sovereign.<sup>348</sup> Courts did so by imputing the king's sovereignty "to the United States government because [the government] is the institutional descendant of the Crown."<sup>349</sup> As such, the United States government, including its departments, agencies and instrumentalities, may not be sued without a valid waiver of sovereign immunity. However, "[w]riting an effective waiver of sovereign immunity is one of Congress' more daunting challenges".<sup>350</sup> The "Supreme Court has repeatedly taken the position that any such waivers must be "clear and unequivocal"<sup>351</sup> in their statutory text<sup>352</sup> with any ambiguity being

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<sup>346</sup> Note, *Federal Sovereign Immunity and Clean Water: A Supreme Misstep*, 24 ENVTL. L. 263, 263 (1994) (citing, WILLIAM BLACKSTONE, COMMENTARIES, 238-39)

<sup>347</sup> Abate and Cogswell, *Sovereign Immunity and Citizen Enforcement of Federal Environmental Laws: A Proposal for a New Synthesis*, 15 VA. ENVTL. L.J. 1, 4 (1995)

<sup>348</sup> Note, *supra* note 341, at 263

<sup>349</sup> *Id.*

<sup>350</sup> Hourclé, *Federal Facilities* 7 (1997)

<sup>351</sup> *Hancock v. Train*, 426 U.S. 167 (1976); *Ruckelshaus v. Sierra Club* 463 U.S. 680 (1983); *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992); and *United States Dep't of Energy v. Ohio*, 503 U.S. 607 (1992)

<sup>352</sup> *Nordic Village, Inc.*, 503 U.S. at 37 ("the "unequivocal expression" of elimination of sovereign immunity that we insist upon is an expression in statutory text. If clarity does not exist there, it cannot be supplied by a committee report".)

resolved in favor of the government (i.e. that there is no waiver).<sup>353</sup> For example, in *United States Department of Energy v. Ohio*, the Supreme Court narrowly interpreted the waiver of sovereign immunity in the Resource Conservation and Recovery Act (RCRA) and held that the statute did not waive sovereign immunity for punitive fines.<sup>354</sup> In response, Congress, in an effort to make the waiver of sovereign immunity “as clear and unambiguous as humanly possible”,<sup>355</sup> passed the Federal Facilities Compliance Act of 1992<sup>356</sup> which, *inter alia*, broadened RCRA’s waiver of sovereign immunity to include punitive fines.<sup>357</sup> The waiver of sovereign immunity in RCRA was apparently used as a pattern for the waiver of sovereign immunity in Title X.

## **B. SOVEREIGN IMMUNITY AND LEAD-BASED PAINT**

Title X includes a waiver of sovereign immunity which subjects both federal property and federal actions<sup>358</sup> to “all Federal, State, interstate, and local requirements, both substantive and procedural ... respecting lead-based paint, lead-based paint activities, and

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<sup>353</sup> Dep’t of Energy, 503 U.S. at 615 (“Waivers of immunity must be ‘construed strictly in favor of the sovereign’ [citation omitted] and not enlarge[d] ... beyond what the language requires.”); Hourclé, *Federal Facilities* 7-8 (1997) (The quoted text included the preceding three footnotes although the footnotes were presented in a different format)

<sup>354</sup> Dep’t of Energy, 503 U.S. at 611 (The Supreme Court also held that the waiver of sovereign immunity in the Clean Water Act did not subject the government to liability for civil fines for past violations of the Clean Water Act.)

<sup>355</sup> Horne, Case Note, *Federal Facility Environmental Compliance After United States Department of Energy v. Ohio*, 65 COLO. L. REV. 632, 638 (1994)

<sup>356</sup> Pub.L. No. 102-386, §102(a), 106 Stat. 1505 (1992) (codified at 42 U.S.C. §6961(a) (1994))

<sup>357</sup> 42 U.S.C. §6961(a) (1994)

<sup>358</sup> Sovereign immunity is only waived for actions which result, or may result in, a lead-based paint hazard. 15 U.S.C. §2688 (1994)

lead-based paint hazards in the same manner, and to the same extent as any nongovernmental entity is subject to such requirements".<sup>359</sup> While the lead-based paint waiver of sovereign immunity was patterned after RCRA's waiver, it is different in that it does not require federal facilities to be treated in the same manner as state or local governmental agencies.<sup>360</sup> The lead-based paint waiver only requires federal facilities to be treated as any other "nongovernmental entity". As such, state or local governments may exempt themselves from certain lead-based paint provisions and yet still require federal agencies to comply with those provisions.

### (1) SCOPE OF WAIVER

The lead-based paint waiver of sovereign immunity is applicable to federal agencies "(1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in a lead-based paint hazard".<sup>361</sup> Because the Air Force has jurisdiction over its housing, Air Force housing falls squarely within the scope of the lead-based paint waiver of sovereign immunity. As such, the Air Force is subject to sanctions for not complying with state and local requirements regarding "lead-based paint, lead-based paint activities and lead-based paint hazards".<sup>362</sup> Such requirements may be substantive or

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<sup>359</sup> 15 U.S.C. §2688 (1994)

<sup>360</sup> The waiver of sovereign immunity in RCRA requires federal facilities to be subject to state and local requirements to the same extent as any person is subject to such requirements. 42 U.S.C. §6961(a) (1994). Because RCRA's definition of "person" includes states, political subdivisions of states and municipalities, federal facilities must only comply with state and local laws to the same extent as governmental entities.

<sup>361</sup> 15 U.S.C. §2688 (1994)

<sup>362</sup> *Id.*



procedural and may include any requirement for certification, licensing, record keeping or reporting.<sup>363</sup> As a result, it is difficult to imagine a generally applicable state or local lead-based paint program which would not be included in this expansive waiver of sovereign immunity.

### C. STATE LEAD-BASED PAINT PROGRAMS<sup>364</sup>

Faced with possible fines and injunctions, Air Force installations must be cognizant of state and local lead-based paint programs. States have responded to the hazards associated with lead-based paint with a variety of programs. Although some states have failed to enact any laws regarding residential lead-based paint,<sup>365</sup> most states regulate residential lead-based paint in some manner. However, state lead-based paint programs vary widely and range from comprehensive programs requiring abatement, to programs which merely provide information to the general public concerning the dangers posed by residential lead-based paint. The lead-based paint laws from Massachusetts, Illinois and California are discussed below as a representative sample of state lead-based paint programs which may affect Air Force installations.

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<sup>363</sup> *Id.*

<sup>364</sup> Title X explicitly allows states to regulate lead-based paint and impose more stringent requirements. 15 U.S.C. §2685(e) (1994). In addition, states may administer and enforce the federal lead-based paint training and certification program (15 U.S.C. §2682) and the lead hazard information pamphlet program (15 U.S.C. §2686). 15 U.S.C. §2684 (1994). However, state programs to implement these federal programs are not discussed in this section.

<sup>365</sup> Alabama, Alaska, Colorado, Florida, Hawaii, Idaho, Kansas, Mississippi, Montana, Nevada, New Mexico, North Dakota, South Dakota, Tennessee, Utah, Washington, West Virginia and Wyoming

### (1) MASSACHUSETTS' LEAD-BASED PAINT PROGRAM<sup>366</sup>

Massachusetts has one of the oldest and most comprehensive lead-based paint programs in the country. Massachusetts enacted its first lead-based paint statute in 1971.<sup>367</sup> The statute established a lead-based paint program that was broad in scope and required, *inter alia*, reporting by physicians of lead poisoning in children,<sup>368</sup> a public information program to promote awareness concerning the danger of lead poisoning,<sup>369</sup> a program to detect the sources of lead poisoning,<sup>370</sup> and the establishment of a state laboratory to test samples and specimens for lead.<sup>371</sup> The program also required that "[w]henever a child or children under six years of age resides in any residential premises in which any paint, plaster or other accessible materials contain dangerous levels of lead ... the owner shall remove or cover said paint, plaster or other material so as to make it inaccessible to children under six years of age."<sup>372</sup> The statute specifically excluded repainting with non-lead-based paint as a means of complying with the statute.<sup>373</sup> By requiring abatement or covering of lead-based paint hazards in private homes, Massachusetts' program greatly exceeded any federal requirement. However, Massachusetts' program did not have the far

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<sup>366</sup> MASS. GEN. LAWS ANN. ch. 111, §§189A-199B (West 1996)

<sup>367</sup> 1971 Mass. Acts 1076-82

<sup>368</sup> 1971 Mass. Acts 1077 (codified at MASS. GEN. LAWS ANN. ch. 111, §191 (West 1996))

<sup>369</sup> *Id.* (codified at §192)

<sup>370</sup> *Id.* at 1078 (codified as amended at §194)

<sup>371</sup> *Id.* at 1079 (codified as amended at §195)

<sup>372</sup> *Id.* at 1080 (codified as amended at §197)

reaching impact intended. For example, "between 1981 and 1986, only 2260 of 450,339 lead-contaminated units in the selected area were abated. The limited success of the regulatory program [was] attributed to "organized opposition from real estate interests and limited funding for enforcement.""<sup>374</sup> Even though most owners of property were not complying with Massachusetts law, in fiscal years 1992 and 1993, Hanscom Air Force Base, Massachusetts, removed all lead-based paint in base housing at a cost of \$6.3 million dollars.<sup>375</sup>

In 1993, Massachusetts amended and expanded its lead-based paint program.<sup>376</sup> However, the most notable change scaled back the abatement provisions and allowed owners to "contain" lead-based paint hazards by painting over such hazards with non-lead-based paint which had been approved by the state for such use.<sup>377</sup>

Massachusetts' current lead-based paint program requires sellers to notify prospective purchasers of lead-based paint hazards,<sup>378</sup> requires the use of state certified contractors for lead-based paint abatement,<sup>379</sup> requires owners to notify the local board of

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<sup>373</sup> *Id.*

<sup>374</sup> Note, *Recent Development: Easing Lead Paint Laws: A Step in the Wrong Direction*, 18 HARV. ENVTL. L. REV. 265, 267 (1994)

<sup>375</sup> Telephone interview with First Lieutenant Brian W. MacDonald, Lead-Based Paint Officer, Hanscom Air Force Base, Massachusetts (Jun. 23, 1997)

<sup>376</sup> 1993 Mass. Acts 1422-1442

<sup>377</sup> *Id.* at 1426, 1423 (codified at MASS. GEN. LAWS ANN. Ch. 111, §§189A and 197 (West 1996)

<sup>378</sup> *Id.* at §197A

<sup>379</sup> *Id.* at §197(d)

health before beginning lead-based paint abatement work,<sup>380</sup> and requires a licensed inspector to perform a post-abatement inspection and issue a letter of full compliance.<sup>381</sup> In addition, Massachusetts' program imposes strict liability on the owner of any premises for damages to a child under six years of age for lead-poisoning caused by failure to comply with the lead-based paint abatement provisions.<sup>382</sup>

## (2) ILLINOIS' LEAD-BASED PAINT PROGRAM<sup>383</sup>

Illinois' lead-based paint program is not as extensive as Massachusetts' program. Illinois' program was first enacted in 1973<sup>384</sup> and significantly amended in 1991<sup>385</sup> and 1995.<sup>386</sup> The most important facet of Illinois' program is the requirement that physicians "screen children 6 months to 6 years of age for lead poisoning who reside in an area defined as high risk".<sup>387</sup> If a child is found to have an elevated blood lead level, the

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<sup>380</sup> *Id.* at §197(c)

<sup>381</sup> *Id.*

<sup>382</sup> *Id.* at §199. (Owners with letters of compliance are not strictly liable for damages caused by lead poisoning.) Under the Federal Tort Claims Act (FTCA), the Air Force may be liable for damages due to the negligence of its employees acting within the scope of their employment. 28 U.S.C.1346(b) (1994). The Air Force may not be held strictly liable under the FTCA. However, violating a state statute may be evidence of negligence.

<sup>383</sup> ILL. ANN. STAT. ch. 410, para. 45/1 - 45/17 (Smith-Hurd 1993 and supp. 1997)

<sup>384</sup> 1973 Ill. Laws 1559-1562

<sup>385</sup> 1991 Ill. Laws 1238-1245

<sup>386</sup> 1995 Ill. Laws 3984-4000

<sup>387</sup> ILL. ANN. STAT. ch. 410, para. 45/6.2 (Smith-Hurd 1993 and supp. 1997) A high risk area is defined as "an area in the State determined by the Department to be high risk for lead exposure for children under 6 years of age. The Department shall consider, but not be limited to, the following factors ... age and condition of housing, proximity to highway

physician must make a report to the Illinois Department of Public Health.<sup>388</sup> Upon receipt of such a report, representatives from the Department of Public Health may inspect the child's dwelling.<sup>389</sup> If the inspection identifies a lead hazard,<sup>390</sup> the owner is required to mitigate the hazard.<sup>391</sup> A lead hazard is deemed to have been mitigated if "the surface identified ... is no longer in a condition that produces a hazardous level of leaded chips, flakes, dust ... that can be ingested or inhaled by humans"<sup>392</sup>, or the lead coated surface is removed, covered or is no longer accessible by children.<sup>393</sup>

Illinois' program does not require the inspection or abatement of lead-based paint in housing unless a child has been identified as having an elevated blood lead level. This general approach has been referred to as the "canary in the coal mine" approach and has been criticized for using children as the indicator species.<sup>394</sup> However, Illinois' program also

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traffic or heavy local traffic or both, percentage of housing determined as rental or vacant, proximity to industry using lead, established incidence of elevated blood lead levels in children, ..." ILL. ANN. STAT. ch. 410, para. 45/2 (Smith-Hurd 1993 and supp. 1997) The stringency of the screening requirement was reduced in 1995. The 1991 amendment to paragraph 45/6.2 required physicians to screen all children for elevated blood lead levels from 6 months to 6 years of age. 1991 Ill. Laws 1238, 1240.

<sup>388</sup> ILL. ANN. STAT. ch. 410, para. 45/7 (Smith-Hurd 1993 and supp. 1997)

<sup>389</sup> *Id.* at 45/8

<sup>390</sup> Lead hazard is defined as "a lead bearing substance that poses an immediate health hazard to humans." ILL. ANN. STAT. ch. 410, para. 45/2 (Smith-Hurd 1993 and supp. 1997)

<sup>391</sup> *Id.* at 45/9

<sup>392</sup> *Id.*

<sup>393</sup> *Id.*

<sup>394</sup> Mahoney, *Four Million Children at Risk: Lead Paint Poisoning Victims and the Law*, 9 STAN. ENVTL. L.J. 46, 54 (1990) (This approach has also been referred to as using children as children as "lead detectors".)

blood levels.<sup>403</sup> However, the California statute does allow for the promulgation of regulations which would govern “the abatement of lead paint in and on housing, including, but not limited to, standards for enforcement, testing, abatement and disposal.”<sup>404</sup> These regulations have not been promulgated as of yet. If these regulations are ever promulgated, they may have a significant impact on abatement activities at Air Force installations located in California.

#### D. TORT IMPLICATIONS

Under the Federal Tort Claims Act (FTCA), the United States may be liable for damages caused by the negligent acts or omissions of its employees acting within the scope of their employment.<sup>405</sup> However, the waiver of sovereign immunity in the FTCA is subject to the discretionary function exception.<sup>406</sup> Under the discretionary function exception, the United States may not be liable for damages resulting from a decision that is committed to the discretion of a federal agency or employee.<sup>407</sup> The FTCA does not define “discretionary function”. However, the Supreme Court in *United States v. Gaubert*,<sup>408</sup> outlined a two-part

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<sup>403</sup> *Id.* at §124130

<sup>404</sup> *Id.* at §124160

<sup>405</sup> 28 U.S.C. §1346(b) (1994)

<sup>406</sup> 28 U.S.C. §2680(a) (1994) (The government may not be held liable under the FTCA for claims “based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.”)

<sup>407</sup> *Id.*

<sup>408</sup> 499 U.S. 315 (1991)

action in *Angle* arose prior to the enactment of Title X and the implementation of the current Air Force lead-based paint policy.<sup>416</sup> Both Title X and the current Air Force lead-based paint policy may negate the discretionary function exception in lead-based paint cases.

### **(1) APPLICABILITY OF THE DISCRETIONARY FUNCTION EXCEPTION**

To fall within the first part of the discretionary function test, agency action must “involve[] an element of judgment or choice.”<sup>417</sup> “[W]hen a federal statute, regulation or policy specifically prescribes a course of action for an employee to follow”,<sup>418</sup> the discretionary function exception does not apply.<sup>419</sup> The lead-based paint waiver of sovereign immunity prescribes just such a course of action by requiring federal agencies to “comply with, all Federal, State, interstate, and local requirements, ... respecting lead-based paint, lead-based paint activities, and lead-based paint hazards”.<sup>420</sup> Because the lead-based paint waiver of sovereign immunity imposes a specific, mandatory duty to abide by state lead-

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<sup>415</sup> Sixth Circuit Rule 24(c) states that citation of unpublished dispositions is disfavored except for establishing *res judicata*, estoppel, or the law of the case.

<sup>416</sup> *Angle v. United States*, 931 F.Supp. 1386, 1390 (W.D. Mich. 1994) (Cause of action arose between March, 1989 and January, 1991)

<sup>417</sup> *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)

<sup>418</sup> *Id.*

<sup>419</sup> Executive Orders may eliminate the discretionary function exemption. The Court of Appeals for the Ninth Circuit held that Executive Order No. 11258 “constitute[d] a specific and mandatory direction ... to provide secondary treatment for waste” and thereby prevented the application of discretionary function exception. *Starrett v. United States*, 847 F.2d 539, 541 (9th Cir. 1988). However, no case has held that Executive Order No. 12088, discussed in Part VI of this article, eliminates the discretionary function exception. In the context of lead-based paint and the discretionary function exception, Executive Order No. 12088 is largely irrelevant due to the expansive lead-based paint waiver of sovereign immunity.

based paint laws, failure to do so may negate the discretionary function exception and subject the Air Force to tort suits under the FTCA.

In addition, the Air Force lead-based paint policy establishes mandatory duties regarding lead-based paint which may also negate the discretionary function exception. In, *Pierre v. United States*,<sup>421</sup> the United States District Court for Massachusetts held that HUD was liable for failing to remove lead-based paint from a home as required by HUD regulations.<sup>422</sup> The District Court found that the decision not to remove the lead-based paint from the home was not a discretionary decision beyond the reach of the FTCA.<sup>423</sup> The District Court stated that "the decision by the Secretary of HUD to implement a particular policy of lead-based paint removal falls within the discretionary function exemption of the FTCA. ... [But], [t]he regulations and manuals which implement HUD's lead-based paint removal policy do not contemplate a policy-making discretionary function for those at the operational or implementational level."<sup>424</sup> As such, failure to properly implement the Air Force lead-based paint policy may eliminate the discretionary function exception and subject the Air Force to tort actions under the FTCA.

The lead-based paint waiver of sovereign immunity and the Air Force lead-based paint policy may have eliminated the discretionary function exception for many lead-based

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<sup>420</sup> 15 U.S.C. §2688 (1994)

<sup>421</sup> 741 F.Supp. 306 (D. Mass. 1990)

<sup>422</sup> *Id.* at 309-10

<sup>423</sup> *Id.* at 309

<sup>424</sup> *Id.* at 319



paint tort cases. As such, the Air Force may be liable for negligent acts or omissions involving lead-based paint if those acts or omissions violate state law or Air Force policy.

#### **E. CONCLUSION - STATE LEAD-BASED PAINT PROGRAMS**

State lead-based paint programs range from stringent to non-existent and are subject to change at any time by the state legislature. As such, the impact of state lead-based paint programs on Air Force installations will vary from state to state over time. However, the expansive lead-based paint waiver of sovereign immunity necessitates that Air Force installations be mindful of state and local lead-based paint programs to avoid the possible imposition of sanctions as well as potential tort liability.

#### **VII. CONCLUSION**

Residential lead-based paint has been the subject of federal legislation since 1971. Yet, despite numerous statutes and amendments regulating lead-based paint, Air Force housing which is currently in use by Air Force personnel is only subject to RCRA, the disclosure rule, the training and certification rule for personnel engaged in lead-based paint activities, and applicable state requirements.<sup>425</sup> Air Force housing which is being sold may be subject to additional inspection and abatement requirements. Despite the overall lack of federal regulation, the Air Force has developed an effective program to manage lead-based paint hazards. The incidence rate of elevated blood lead levels for children living on Air Force installations is 0.7 percent, well below the national average of 8.9 percent. Even though I am aware that it is best not to fix things which are not broken, I believe the

implementation of the Air Force lead-based paint program could be improved. The forthcoming Air Force Instruction and Air Force Manual should clearly distinguish between requirements and guidance, then allow each installation the flexibility to adopt a lead-based paint management plan which is best suited to its particular circumstances. In this way, installations will be given the information they need to develop effective, cost-conscious lead-based paint management plans.

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<sup>425</sup> If EPA would accept the suggestion in this paper and return to its 1987 interpretation of the household hazardous waste exclusion, residential lead-based paint would not even be subject to RCRA Subtitle C regulation.